IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL NO. 16 OF 2017

1. **ALEX SENKORO**
2. **DR. NICHOLAS MRINGO**
3. **FREDERICK I. MRINGO**
4. **FIDELIA LEMA**

..... **APPELLANTS**

VERSUS

ELIAMBUYA LYIMO (As Administrator of the Estate of Frederick Lyimo, Deceased) ..... **RESPONDENT**

(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)
(Nchimbi, J.)

dated the 3rd day of September, 2012
in
Land Appeal No. 25 of 2010

.....

JUDGMENT OF THE COURT

25th March & 13TH April, 2021

NDIKA, J.A.:

The main question in this appeal is whether the appellants, separately owning pieces of land adjoining the respondent's land, have a right of way over the respondent's land to their respective properties. The District Land and Housing Tribunal of Kinondoni District ("the trial tribunal") determined that issue in favour of the appellants but that outcome was reversed on appeal to the High Court of Tanzania, Land Division at Dar es Salaam ("the High Court").

For an understanding of the context in which the above question has arisen, we narrate the essential facts of the case as follows: the appellants and two other persons not parties to this appeal (Prosper Shayo and Khalfan H. Kipande) sued the respondent claiming that they had a right of way through the latter's contiguous land to their respective pieces of land. On the part of the said Prosper Shayo along with the first, second and third appellants, it was averred, in their joint statement of claim, that they owned their respective pieces of land for more than twenty years after purchasing them from the previous owner, Mr. Frederick Lyimo, the respondent's deceased husband. The said Khalfan H. Kipande and the fourth appellant, on their part, claimed to have acquired their respective pieces from a different owner. What was common to all the six persons is their claim that they shared a common passage through the respondent's land to their respective pieces of land.

The factual and legal basis of the claimed right of way is asserted in paragraph 5 (a) (iii) to (vii) of the statement of claim. It is instructive to extract that part in full thus:

> *"(iii) That upon the sale of the parcels of land to different persons namely the applicants more than twenty years ago,* ***the said Frederick Lyimo gave each of the applicants aforesaid a right of way to their respective properties*** *which in the sketch*

plan is identified as the whole length and width of the area between Piots Nos. 5/4, 5/5, 5/6, 5/8, 5/9 and 5/10. The occupiers of plots nos. 5/8 and 5/10 have facilitated passage for occupiers of Plots Nos. 5/7 and 5/11 respectively.

(iv) That the respondent is the widow of the said Frederick Lyimo.

(v) That between January and February, 2009 ***the respondent without any claim of right or if it did exist it was fraudulently obtained*** *(sic),* ***with a view to defeating the contractual right of way (and statutory right) given by her late husband, obliterated the passage*** *immediately after the demarcation between Plots Nos. 5/6 and 5/7 whereby she built or caused to be built thereat (sic) a permanent brick wall from Plots Nos. 5/6 to 5/4.*

(vi) That as a ***result of the blockage, the applicants could not access their respective properties from the approach they usually did*** *a fact which was life threatening especially in case of emergencies. The applicants had no other way of accessing their respective properties.*

(vii) That upon the applicants' complaint the local government of the area did intervene and demolished the structures so erected. In the month of May 2009

the respondent resumed construction in full force and is not responding to any calls to stop the obliteration."
[Emphasis added]

On the basis of the foregoing, the appellants sought a declaration that they were entitled to the right of way as granted to them by the late Frederick Lyimo. In the alternative, they beseeched a declaration that any right the respondent may claim to have existed on the blocked area was extinguished by the grant of right of way and by limitation. In addition, they prayed for the removal of the obstacle to the passage and a permanent injunction against the respondent.

In her defence, the respondent essentially disputed that her deceased husband ever excised a portion of his surveyed land for the appellants' use as an access road to their respective properties while there existed several other passages from the main road to those properties. However, she acknowledged that she was always willing to allow the use of a path over her land as a walkway for pedestrians but not as an access road for motor vehicles. In addition, she counterclaimed that the piece of land alleged by the said Prosper Shayo to be his property was part of the estate of her deceased husband.

The trial tribunal was impressed by the appellants' case. It found it proven that after the appellants had acquired their pieces of land they

developed them using the disputed access road to transport building materials to their respective properties and that they continued using it as a common passage after the construction works were completed. From this evidence, the trial tribunal inferred:

> *"that the respondent's husband had either given that road to the applicants or there were in existence such circumstances which made the applicants believe that the disputed area has been made available [to] them to be used as a road. They had used it for twenty years and more."*

Ultimately, the trial tribunal ordered the respondent to clear the passage forthwith. Moreover, it ordered her to engage a government valuer "to value the three-metre stretch of a piece of land that forms part of the road for compensation from the applicants [now the appellants] to be shared equally and paid by the applicants."

On appeal to the High Court by the respondent herein, Nchimbi, J. vacated the trial tribunal's judgment and decree mainly on the ground that there was no cogent proof that the alleged passage over the respondent's property existed. The relevant part of that decision is at page 116 of the record of appeal:

> *"Like I have shown above,* ***there is no sufficient evidence on record, on the preponderance of probability, that the disputed path was in existence or that the use of the appellant's [the respondent's herein] surveyed plot had been adjusted to accommodate a passage****. DW2 Salum M. Kassim, a Kinondoni Municipal Council [official] by then, categorically stated that Plot No. 926 has been legally approved and that there is no way through that plot. He also explained on the use of the said plot. He did not suggest that the respondents have any right of way on the plot. On the whole, he said the survey was properly conducted. From the judgment of the trial tribunal it is indicative that the* ***Chairman stepped into the shoes of the parties by trying to create a path for them.*** *He was not justified to do that."* [Emphasis added]

One of the specific issues dealt with by the learned appellate Judge was the appellants' allegation that their adversary obliterated the existing path by fraud. He dismissed that complaint on the grounds that it was not pleaded in the statement of the claim with sufficient particularity, that it did not feature as one of the eight issues framed for trial and that it was wrongly and belatedly raised by the appellants' counsel in his submissions at the High Court.

Resenting the above outcome, the appellants have appealed to this Court on a memorandum of appeal raising six grounds thus:

> *"1. That the memorandum of appeal filed in the High Court on 1st April, 2010 in respect of a decree of the Housing Tribunal dated 11th February, 2010 was, according to emerging school of law, time-barred since the respondent did not obtain an order of the High Court to exclude the period the respondent was waiting to be supplied with copies of judgment and decree of the court of first instance.*
>
> *2. That the learned High Court Judge erred in faulting the appellants for not giving particulars of the respondent's fraud in that the law does not provide a mandatory form of pleading fraud and also that the provisions of the Civil Procedure Code relative to fraud are subjective in that it is only when the particulars may be necessary to substantiate any allegation that they must be pleaded.*
>
> *3. That the learned High Court Judge erred in not giving cognizance to the right of passage (right of way) in the face of cogent evidence that the 1st, 2nd and 3rd appellants acquired their pieces of land from the respondent's deceased husband, that the appellants and respondent all originally occupied unsurveyed land that all the appellants share common boundary or common access to the road with the respondent.*

4. That the learned High Court Judge erred in not finding that the private survey and offer of the land to the respondent's deceased husband did not take into account third party interests as is required by law.

5. That in the alternative ... the learned High Court Judge erred in not giving recognition to the fact that the appellants had used the blocked passage to their residences for over twelve years and hence had acquired the right of way by prescription.

6. That the learned High Court Judge erred in not holding that the counterclaim was barred by limitation."

It is noteworthy that the said Prosper Shayo and Khalfan H. Kipande opted out of pursuing an appeal to this Court against the High Court's decision.

At the hearing of the appeal before us, the appellants were advocated for by Mr. Fulgence Massawe, learned counsel, who argued the first five grounds and dropped the sixth ground. For the respondent, Mr. Castor A. Rweikiza, learned counsel, strongly resisted the appeal.

We propose to deal with the grounds of appeal seriatim, beginning with the first ground of appeal. In essence, the complaint here is that the respondent's appeal to the High Court was time-barred and so, the High Court ought to have dismissed the appeal instead of taking cognizance of it.

At the beginning, Mr. Massawe's major premise on the question of limitation was that the respondent was not entitled to an automatic exclusion of the period of time requisite for obtaining a copy of the decree appealed from in terms of section 19 (2) and (3) of the Law of Limitation Act, Cap. 89 R.E. 2002 [now R.E. 2019] ("the LLA") in computing the applicable limitation period for appealing to the High Court from the trial tribunal and that such an exclusion had to be made pursuant to an order of the court in a formal application for extension of time. However, he subsequently conceded that the exclusion envisaged under the aforesaid statutory provisions applies automatically and that any prescribed limitation period for appealing must be reckoned from the moment the appellant obtained a copy of the decree and or judgment appealed from.

Specifically on whether the respondent's appeal to the High Court was duly lodged, Mr. Massawe argued that it was time-barred because the memorandum of appeal instituting the said appeal was lodged on 1st April, 2010, which was about five days after the prescribed limitation period of forty-five days had elapsed counting from 11th February, 2010, the date the impugned decision was handed down. He reasoned that since the decree appealed from was dated 11th February, 2010, which he also cited as the decree's date of issue, the respondent could not avail herself of the exclusion

under section 19 (2) of the LLA even though the impugned judgment is shown to have been certified on 18th March, 2010.

Mr. Rweikiza's submission in reply was two-fold: first, he supported the view that the exclusion envisioned under section 19 (2) and (3) of the LLA is automatic. Secondly, while conceding to his learned friend's submission on the dates on which the impugned judgment was delivered and the appeal to the High Court was lodged, he firmly contended that the respondent duly applied in writing for a copy of the judgment and decree on 12th February, 2010 and that she collected the copies on 26th March, 2010 following their certification on 18th March, 2010. He submitted that the appeal was lodged on the thirteen day after the documents were certified.

To begin with, we have indicated that the parties are not at issue on the applicability of the exclusion envisaged under sub-sections (2) and (3) of section 19 of the LLA. These sub-sections provide in clear terms that:

> *"(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered,* ***and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded.***

(3) Where a decree is appealed from or sought to be reviewed, ***the time requisite for obtaining a copy of the judgment on which it is founded shaii be excluded.****"*[Emphasis added]

We entertain no doubt that the above sub-sections expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from the computation of the prescribed limitation period. Such an exclusion need not be made upon an order of the court in a formal application for extension of time. Indeed, that stance was taken recently in **Mohamed Salimini v. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2018 (unreported) where the Court affirmed that section 19 (2) of the LLA obliges courts to exclude the period of time requisite for obtaining a copy of the decree appealed from.

Furthermore, this Court took a similar standpoint in two recent decisions where the proviso to section 379 (1) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2002 [now R.E. 2019], an analogous exclusion stipulation, was considered: **Director of Public Prosecutions v. Mawazo Saliboko @ Shagi & Fifteen Others**, Criminal Appeal No. 2017; and **Samuel Emmanuel Fulgence v. Republic**, Criminal Appeal No. 4 of 2018 (both unreported). To illustrate the point, we wish to extract what we said in **Mawazo Saliboko @**

Shagi & Fifteen Others (*supra*) where the learned High Court Judge had decided that the exclusion was not automatic:

> *"The learned Judge was of the view that, though the appellant filed the appeal within 45 days after being served with the copy of the proceedings, he ought to have applied for extension of time to do so because he was time-barred from the date of the impugned decision.* ***On our part, we are of the decided view that the intention of the iegisiature under the proviso to section 379 (1) (b) of the CPA was to avoid muitipiicity of, and deiay to disposal of cases. That is why it provided for automatic exclusion of the time requisite to obtain a copy of proceedings, judgment or order appealed from.*** *this is different where the intending appellant finds himself out of 45 days to file an appeal after receipt of the copy of proceedings."* [Emphasis added]

We need to stress what we stated in the above case that the exclusion is automatic as long as there is proof on the record of the dates of the critical events for the reckoning of the prescribed limitation period. For the purpose of section 19 (2) and (3) of the LLA, these dates are the date of the impugned decision, the date on which a copy of the decree or judgment was requested and the date of the supply of the requested document.

The germane issue now is whether or not the appeal to the High Court from the trial tribunal's decision was duly lodged.

It is common ground that the trial tribunal's decision was rendered on 11th February, 2010 and that the appeal to the High Court had to be instituted within forty-five days in terms of section 41 of the Land Disputes Courts Act, Cap. 216 R.E. 2002 read together with Item 2 of Part II of the Schedule to the LLA. It is also on record that the memorandum of appeal instituting the said appeal was lodged on 1st April, 2010. Mr. Massawe contended that since the decree appealed from was dated 11th February, 2010 and hence issued on that same day, the respondent could not avail herself of the exclusion under section 19 (2) of the LLA. With respect, we do not agree with him, at least, for three reasons: first, the date on the decree only indicates the date of the judgment from which that decree was extracted. That date is not necessarily the date on which the decree was extracted. Of course, we note that the decree does not indicate the date it was extracted and issued.

Secondly, noting from the record that the impugned trial tribunal's judgment was certified on 18th March, 2010 and taking into account the practice that a decree is extracted from a judgment upon which it is founded, we think it is preponderant that both the judgment and decree were certified simultaneously by the trial tribunal. Thirdly, even if it were to be assumed that

the exclusion under section 19 (2) of the LLA as to the preparation of the decree appealed from was inapplicable, the respondent could still have availed herself of the exclusion under section 19 (3) of the LLA exempting requisite time for preparation of the judgment on which the decree appealed from is founded. We say so because in terms of Order XXXIX, rule 1 (1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019) ("the CPC"), such copy of judgment on which the decree appealed from is founded, along with a copy of the decree, is required to be attached to the memorandum of appeal when instituting an appeal.

Although Mr. Rweikiza submitted that the respondent collected the two certified documents from the trial tribunal on 26th March, 2010, the record is silent on that aspect. Nevertheless, if the aforesaid date of certification is taken as the point for reckoning the forty-five days prescribed limitation period, the date on which the documents were certified, then the appeal, filed on 1st April, 2010, would still be found to have been duly filed, only thirteen days having elapsed. Accordingly, we find no merit in the first ground of appeal.

On the second ground of appeal, Mr. Massawe faulted the High Court's reasoning on the issue on the ground that there was no mandatory form for pleading fraud. What is required, he said, was the pleading of sufficient particulars to allow the opposite party understand the nature of the claim. He

submitted further that the alleged fraud was that the respondent's deceased husband, having sold the pieces of land to the second and third appellants, had his land surveyed without involving them. As a result, the survey obliterated their access road as it was blocked. On the other hand, Mr. Rweikiza supported the learned High Court Judge's holding that the claim of fraud was pleaded in paragraph 5 (a) (v) of the statement of claim with insufficient particulars, which was a non-compliance with Order VI, rule 4 of the CPC. He added that the appellants predictably produced no evidence at the trial on how their alleged contractual right of passage granted by the respondent's deceased husband was obliterated fraudulently.

We have weighed the contending arguments of the counsel and scrutinized the approach taken by the learned High Court Judge. We are of the view that the learned Judge marshalled capable arguments to support his conclusion that, in terms of Order VI, rule 4 of the CPC, the allegation of fraud ought to have been pleaded specifically and clearly but it was not. These provisions require that:

> *"In all cases in which the party pleading relles on any* ***misrepresentation, fraud, breach of trust,*** *willful default, or undue influence and in all other cases in which particulars may be necessary to substantiate any allegation,* ***such particulars (with dates and items***

if necessary) shall be stated in the pleading."
[Emphasis added]

The averment in paragraph 5 (a) (v) of the statement of claim, which we have reproduced above, claims that between January and February 2009 the respondent fraudulently obliterated the appellants' passage thereby defeating a contractual and or statutory right of way to their respective properties. It is manifest that this averment gives no particulars of the acts allegedly committed by the respondent constituting fraud. In the premises, we endorse the learned Judge's reasoning and finding appearing at page 113 of the record of appeal that:

> *"A pleader is required to furnish full particulars and details of the alleged fraud. This is so because allegation of fraud is the most serious one. Therefore, unless fraud is clearly and specifically stated it cannot be put in issue. It will not be enough that there are allegations in the pleading or statements from which such a plea can be merely spun out.* ***This requirement is strict because fraud must be substantially proved as laid and particularized.*** *The standard of proof is higher than is ordinarily the position in other civil cases where preponderance of probability is the only requisite standard – see* ***Kanji Patel v. Kabui Njoroge*** *[1971] HCD n.336."*
> [Emphasis added]

It is, therefore, our considered view that the learned Judge correctly rejected the complaint on fraud raised belatedly by the appellants' counsel in his submissions at the High Court. It was neither pleaded with sufficient particularity nor was it put up as one of the issues framed for trial. Eventually, the second ground of appeal fails.

Finally, we address the third, fourth and fifth grounds of appeal, which, we think, are closely entwined. While the third ground contends that on the evidence on record the appellants and the respondent shared a boundary and a common access path to the main road over the respondent's unsurveyed land, the fourth ground criticizes the learned High Court Judge for not finding that the private survey over the land of the respondent's deceased husband did not take into account third party interests as required by law. The fifth ground is raised in the alternative to censure the learned High Court Judge for not finding that the appellants' use of the blocked passage for over twelve years had crystalized into an absolute and indefeasible right of way by prescription.

The essential submission by Mr. Massawe on the above grounds was that it was established in evidence that the late Frederick Lyimo granted the second and third appellants a right of way over his land when they purchased from him their respective pieces of land, which were separately hived off the said

Mr. Lyimo's unsurveyed land in 1987 and 1989 respectively. It was posited further that the first and fourth appellants had acquired their respective pieces of land in 1980; that by 1983 they had completed the construction of their homes and that they were using the same access road to the main road through the respondent's unsurveyed land. It was submitted that the evidence was that the alleged easement was large enough for motor vehicles to pass through so as to convey building materials.

Mr. Massawe argued that besides the alleged easement being granted as alluded to above, the appellants enjoyed its use undisturbed for more than twenty years resulting in that right of way crystallizing by prescription in terms of section 31 of the LLA. That at least until the death of the said Mr. Lyimo on 12th July, 2005, there was no dispute over the passage.

As regards the impugned survey of the respondent's land, Mr. Massawe submitted on the authority of **Obed Mtei v. Rukia Omari** [1989] TLR 111 that the High Court erred in not finding the said survey was improper carried out because the second and third appellants were not involved in the process so as to clear their interests. It is claimed that as a result of the survey, the passage that Mr. Lyimo had granted to the two appellants was obliterated.

Finally, Mr. Massawe contended, in the alternative to the main argument, that the alleged right of passage exists either as a granted contractual right or as a prescriptive right, that the appellants should be deemed to be in adverse possession of the strip of land within the respondent's land from 1987 at least until 2005 when the said Mr. Lyimo passed away. On the basis of the alleged adverse possession for more than twelve years, it was submitted that the respondent's title to that strip of land constituting the appellants' access road was extinguished by limitation.

In rebuttal, Mr. Rweikiza argued that there was no proof that the late Mr. Lyimo granted any right of passage when he carved out the pieces of land that he sold to the second and third appellants. He wondered, if such a passage had existed after being granted as alleged, why the appellants kept negotiating with the respondent and other neighbours for an access road. On the claim that the appellants had a prescriptive right of passage, he countered that there was no proof that the appellants had undisturbed use of the claimed passage long enough to create a right by prescription.

Coming to the impugned survey of the respondent's land, Mr. Rweikiza submitted that the case of **Obed Mtei** (*supra*) was inapplicable in that the appellants did not claim that their pieces of land were encroached upon due to the survey. He supported the learned High Court Judge's finding, based on

the evidence of DW2 Salum M. Kassim, a Land Officer and Surveyor from Kinondoni Municipal Council, that the respondent's land was not subject to any easement. On the claim that the alleged right of way arose from long and undisturbed adverse possession, Mr. Rweikiza argued, in essence, that there was no proof of alleged adverse possession.

From the contending submissions of the learned counsel for the parties, the sticking question is whether or not the appellants had an easement over the respondent's land either as a granted right or as a prescriptive right. Ancillary to this issue is the question whether the impugned survey of the respondent's land obliterated the appellants' claimed easement.

Ahead of addressing the above issues, it is imperative that we highlight the legal basis of a right of way as an easement. To begin with, it is noteworthy that section 144 of the Land Act, Cap. 113 R.E. 2002 [now R.E. 2019] ("the Land Act") stipulates the nature of easement, without necessarily defining it, thus:

> *"(1) Subject to the provisions of this Act or any other written law applicable to the use of land, the rights capable of being created by an easement are–*
>
> *(a) any right to do something over, under or upon the servient land; or*

(b) any right that something should not be so done; or

(c) any right to require the occupier of servient land to do something over, under or upon that land;

(d) any right to graze stock on the servient land."

Moreover, section 145 (1) of the Land Act elaborates that the land for benefit of which any easement is created is in that Act referred to as the "dominant land" and the land of the person by whom an easement is created is referred to as "the servient land." In **Shadrack Balinago v. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General**, Civil Appeal No. 223 of 2017 (unreported), we cited with approval the decision of the Court of Appeal of Kenya in **Ruth Wamuchi Kamau v. Monica Mirae Kamau** [1984] eKLR defining an easement as a:

"a convenience to be exercised by one land-owner over the land of a neighbor ... The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come."

At this point it is necessary to state how an easement can be created or acquired. As summarized by Dr. R.W. Tenga and Dr. S.J. Mramba in **Conveyancing and Disposition of Land in Tanzania: Law and Practice**, 2nd Edition, Juris Publishers Limited, Dar es Salaam, 2020, at page 282 *et seq*, an easement can be created either by express grant or by express reservation or by implication. In the first mode of creation, the parties can enter into an express agreement by executing a deed necessary for creating the easement on a land comprised in a right of occupancy or a lease or a part of any of that land for the benefit of that other land – see section 146 (1) of the Land Act. At common law, an express grant of easement must be done by deed or will but not by writing under hand or parole grant – see **Ruth Wamuchi Kamau** (*supra*). In the second mode, an easement is created by express reservation where the owner of the servient land does not actively grant but reserves an easement for himself or in favour of a land he retains. The final mode concerns implied easements, which are created in terms of section 146 (4) and (5) of the Land Act out of implication.

As regards acquisition, section 31 of the LLA provides that an easement may be acquired by prescription as follows:

> *"(1) Where any easement has been* ***enjoyed peaceably and openly as of right, and without***

interruption, for twenty years, the right to such easement shall be absolute and indefeasible.

(2) "Easement" includes-

(a) the access and use of light or air to and from any building enjoyed with the building as an easement;

(b) any way or water course, or the use of any water, enjoyed as an easement." [Emphasis added]

The above section stipulates that an easement crystallizes into an absolute and indefeasible right upon the expiry of twenty years of its peaceable, open and continuous enjoyment by the owner of the dominant land.

Guided by the above position, we now determine the issues we formulated above beginning with the question whether or not the appellants had an easement over the respondent's land as a granted right.

As indicated earlier, Mr. Massawe contended that it is in evidence that the respondent's deceased husband granted the second and third appellants an easement large enough for motor vehicles to pass when he sold to them separately two pieces of land hived off his land in 1987 and 1989. Conversely, Mr. Rweikiza disagreed. He contended that there was no proof of the alleged grant.

Upon careful scrutiny of the evidence on record, we share the learned High Court Judge's finding that, based on the totality of evidence on record, the alleged grant was unproven. While the two appellants claimed that they purchased their respective pieces of land vide written instruments (sale agreements), none of them produced any document to evidence the claimed grant. To be sure, we are cognizant that unlike the second appellant who did not even produce any documentary proof substantiating his purchase of land, the third appellant tendered a sale agreement (Exhibit P.2) which disclosed no such grant. In fact, the third appellant acknowledged in cross-examination, as shown at page 78 of the record, that no access road was granted under the said instrument as he adduced that:

> *"Shayo did not cheat me. In my sale agreement it is not shown if a road was also sold to me. I think you have [misquoted] the sale agreement. We were not sold the road."*

The above apart, we share the learned appellate Judge's view that the evidence that the appellants, the respondent and other neighbours had incessant negotiations in a bid to create an access road wide enough for motor vehicles to pass through raises a reasonable inference that no such access road existed. To stress this point, we find it instructive to extract the relevant part of the learned Judge's decision at page 115 to 116 of the record of appeal:

"There is also the evidence on record that there were negotiations with the Tanzania Society for the Blind. That one Dr. Slaa from the said society, who was a neighbour in the locality in question and the late Frederick were each to part with two metres of their respective land which could be used as a path. The negotiations, however, did not bear any fruits. Be that as it may, the pertinent question to ask is why negotiations when it is alleged there was already an existing path? This question, in the circumstances leaves a lot to be desired."

To be sure, both the second and third appellants alluded to these negotiations in the respective testimonies. The second appellant, in particular, confirmed that they haggled over the amount of compensation to be paid to the respondent in exchange for the right of way. The evidence is that no compensation was paid as the negotiations eventually ended in vain. We hold, in view of the evidence as we have discussed, that the two appellants failed to establish that the respondent's deceased husband granted them an easement over his land. Accordingly, we uphold the learned appellate Judge's finding to that effect.

We now turn to the issue whether the appellants acquired an easement over the respondent's land by prescription. On the issue at hand, Mr. Massawe hypothesized that the appellants enjoyed the alleged easement undisturbed

for more than twenty years until the deceased passed away in July 2005. He contended that it was in evidence that the first and fourth appellants started using the passage since 1980 when they moved to that locality and that the second and third appellants started using it in 1987 and 1989 respectively. On the other hand, Mr. Rweikiza disputed that claim as he contended that the appellants had not proven undisturbed use of the easement long enough to create a prescriptive right.

With respect, we go along with Mr. Rweikiza's submission that the evidence on record does not establish a prescriptive right of way in favour of the appellants. The appellants' use of the alleged passage, in our view, cannot be wholly characterized, on the evidence on record, as peaceable, open and without interruption. It is in evidence that before the said Frederick Lyimo passed away, the parties and other neighbours wrangled over the passage; not just about its existence but its size as well. The incessant negotiations to convince the respondent's family to excise a two-metres strip from its land to form a passage ended in a deadlock. In the circumstances, there can be no inference that the appellants enjoyed peaceable, open and uninterrupted use of easement.

The alternative contention by Mr. Massawe, that the alleged easement should be deemed to have existed on account of the appellants' adverse

possession of the strip of land over the respondent's land used as passage for more than twelve years, is plainly misconceived. At the forefront, the alleged adverse possession, as opposed to prescription, was not expressly pleaded as the basis of the appellants' claimed entitlement to right of way.

Secondly, even if such a pleading had been properly made we are of the firm view that easement cannot be acquired by adverse possession except by way of prescription on account of long use of a minimum of twenty years in terms of section 31 of the LLA, as we have explained earlier. It should be emphasized that an entitlement to an easement is a claim on the right of use of land of another person as a servient tenement as opposed to possession or ownership of that other person's piece of land within outlined confines. If a claim of adverse possession is upheld, the owner's title to the land concerned is extinguished.

Thirdly, the appellants could not sue upon a plea of adverse possession because such a plea cannot be used by a plaintiff as a sword but a shield (defence) when arrayed as a defendant in proceedings initiated against him – see **The Hon. Attorney General v. Mwahezi Mohamed (As the Administrator of the Estate of the late Dolly Maria Eustace) & Three Others**, Civil Appeal No. 391 of 2019 citing **Origenes Kasharo Uiso v. Jacuelin Chiza Ndirachuza**, Civil Appeal No. 259 of 2017 (both unreported).

The said position was recently reaffirmed by the Court on review in **The Hon. Attorney General v. Mwahezi Mohamed (As the Administrator of the Estate of the late Dolly Maria Eustace) & Three Others**, Civil Application No. 314/12 of 2020 (unreported)

The final question whether, on the authority of **Obed Mtei** (*supra*), the impugned survey of the respondent's land obliterated the appellants' claimed easement need not detain us. We have no doubt that **Obed Mtei** (*supra*) was cited out of context and that it does not advance the appellants' cause. In that case, this Court held that before a survey of a piece of land is done and finalized, third party interests must be cleared by allowing owners of adjoining properties participate in the survey and agree on the boundaries. Non-compliance with that requirement would render the resultant survey plan invalid.

The above position is inapplicable to the instant case as the disagreement of the parties herein does not concern the state of the demarcated boundaries between their properties but the existence of an easement in their appellants' favour over the respondent's land within its delineated boundaries. We have already stated that a claim of easement is a claim on the use of land as opposed to its possession or ownership. In this case it is hard to find the impugned survey plan being objectionable or invalid since it demarcated the respondent's

land within its proper confines without encroaching upon adjacent properties. Evidently, there are no third party interests that were affected by the survey to trigger the application of the principle stated in **Obed Mtei** (*supra*).

On the basis of the foregoing, we find no merit in the third, fourth and fifth grounds of appeal. We dismiss them all.

All said and done, we find no merit in the appeal, which we hereby dismiss with costs.

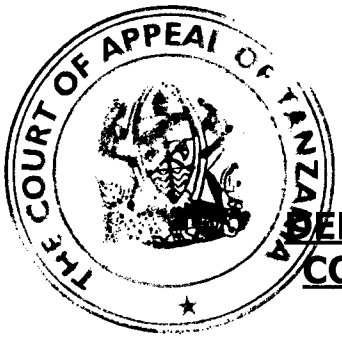
DATED at **DAR ES SALAAM** this 9th day of April, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered on this 13th day April, 2021, in the presence of Mr. Fulgence Massawe, learned counsel for the appellants and Mr. Casto Rweikiza, learned counsel for the respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL