IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 464 OF 2020

MAGOIGA NYANKORONGO MRIRI ..... APPELLANT

VERSUS

CHACHA MOROSO SAIRE ..... RESPONDENT

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

(Galeba, J.)

dated the 5th day of June, 2020
in
Miscellaneous Land Appeal No. 4 of 2020

.....

JUDGMENT OF THE COURT

8th & 14th June, 2022

KOROSSO, J.A.:

This is the third appeal. Magoiga Nyankorongo Mriri, the appellant, has appealed to this Court against the decision of the High Court of Tanzania sitting at Musoma which overturned the decision of the District Land and Housing Tribunal for Tarime (DLHT) and upheld the decision of the Ward Land Tribunal for Kenyamanyori (WLT) dated 30/11/2018.

The facts giving rise to this appeal are founded on a dispute over an unregistered piece of land located at Tagota Village, Kenyamanyori

Ward, Tarime District and Mara Region (suit land). It is alleged that sometime in 1994 for love and affection "friendship", the appellant gave the suit land to his friend, the respondent to install a milling machine, and in consequence, a milling business thereof. It seems the respondent was supposed to occupy the land for five years, that is up to 1999, however, he continued to stay there. In 2006, about 12 years later, the respondent lost a grandchild who he buried in the suit land. By 2017, the respondent had further developed the suit land having constructed two houses roofed with corrugated iron sheets, one slope house with corrugated iron sheet roofing, and 11 temporary structures which were under construction and whose materials are not specified on record. The respondent between 1994 to 2017 constructed a water tank and a well and planted various trees and crops; 223 eucalyptus trees and fruit trees including avocados, bananas, coffee, mangoes, and others.

It was on 6/10/2018 that the respondent who had developed the suit land to some extent, filed Land Case No. BKK 24 of 2018 at WLT against the appellant seeking protection of the law and to justify his ownership of the suit land. His claims were upheld by the WLT. The appellant was aggrieved and successfully appealed to the DLHT in Land Appeal No. 3 of 2019, which ruled that as the respondent had been invited to the suit land, he could not have owned it. The respondent was

dissatisfied with the decision and successfully appealed to the High Court in Miscellaneous Land Appeal No. 4 of 2020.

Aggrieved, the appellant filed a notice of appeal on 21/1/2020 and lodged a memorandum of appeal predicated on one single ground drawn from the granted certificate of point of law in Miscellaneous Application No. 33 of 2020, that:

1. *Whether an occupier who is an invitee or a licencee can ultimately become an absolute owner of land based on the fact that he develops it and the true owner does not claim it back until 23 years lapse.*

When the appeal was called for hearing before us, the appellant was represented by Mr. Innocent John Kisigiro, learned Advocate. The respondent was represented by Mr. Cosmas Tuthuru, learned Advocate.

Mr. Kisigiro prefaced his submissions by faulting the WLT and the High Court for finding that the suit land was owned by the respondent simply because he had stayed in the land for about 23 years without disturbance forgetting that he had occupied that land upon being allowed to do so by the appellant. He contended that the High Court misapprehended the evidence since the respondent stayed without being disturbed for only 12 years after the appellant had given the land for a specific purpose to the respondent out of friendship. He faulted the WLT

for its holding which was upheld by the High Court that the suit land was the property of the respondent by adverse possession.

He argued further that the Court should consider the judgment of the DLHT which stated that even if the respondent had stayed on the suit land for more than 12 years, since he had just been given the land out of friendship to use it, and he had sought permission from the appellant before doing any development on it and had done nothing but what they had agreed, he was still an invitee. That the appellant had given suit land to the respondent to install milling machine and conduct business commensurate therefrom and not to acquire it.

According to the learned counsel the appellant and respondent had lived peacefully, and all hell broke loose when the appellant found out that the respondent had buried his grandson in the suit land which contravened their agreement. The counsel faulted the High Court judge finding that since the respondent had been there for more than 23 years he should not be disturbed while forgetting that the appellant's trees were still in the suit land.

On the issue whether the respondent was a licencee and whether he can acquire land by adverse possession, Mr. Kisigiro contended that the status of a licencee does not change and cited the decision of this

Court in **Registered Trustees of Holy Spirit Sisters Tanzania Vs January Kamili Shayo and 130 Others**, Civil Appeal No. 193 of 2016 (unreported) where the Court expounded factors and conditions for adverse possession. The learned counsel argued further that the circumstances of the instant case do not fit the ingredients outlined there and as found in the said case, it is the same that the respondent is still a licencee and cannot acquire the status of an adverse possessor. He urged the Court to find that the way the suit land was handed to the respondent cannot remove his status as a licencee regardless of how many years he stayed in the suit land.

The learned counsel referred us to another case, **Maigu E.M Magenda Vs Arbogast Mango Magenda**, Civil Appeal No. 218 of 2017 (unreported). He argued that in the cited case, despite staying in the suit land for 12 years the Court held that a licencee cannot acquire the status of an adverse possessor, imploring us to be inspired by the said decision even though the facts may differ with the present case.

The learned counsel urged us to rectify the error by the High Court judge for failing to determine the status of the respondent and trying to show that the respondent was neither a licencee nor an adverse possessor and leaving the issue unresolved. Mr. Kisigiro also touched on

the claims by the respondent that he had purchased the suit land from the appellant saying the respondent has not adduced evidence to that effect and thus the claims are a nonstarter. He concluded his submissions praying for the appeal to be allowed and that no costs be awarded in view of the relationship between the parties.

On the part of the respondent, Mr. Tuthuru stressed the fact that the respondent was neither an invitee nor a licencee. He contended that the invitation to occupy the suit land from the appellant was only for the first five years when he was to install a milling machine then later he was allowed to plant trees which he did but later the conditions changed, and he developed the land and even buried his grandson in the suit land and thus the respondent is entitled to the land on the prescriptive doctrine and that of acquiescence.

The learned counsel urged the Court to find the case of **Registered Trustees of the Holy Spirit Sisters Tanzania** (supra) cited by the appellant's counsel distinguishable under the circumstances and implored the Court to depart from the principles pronounced therein and be persuaded by the holding by the High Court judge in the instant case, that where people live peacefully in a land such as the respondent for a long time without any disturbance and having developed it then

such peaceful existence should not be disturbed. That this is the case of the respondent who has occupied the suit land peacefully for more than 23 years. Mr. Tuthuru closed his arguments praying that the appeal be dismissed for lack of merit.

Mr. Kisigiro's rejoinder was brief, and he reiterated his complaint faulting the High Court judge for his findings which only considered the fact that the respondent had stayed in the suit land for a long time whilst that fact by itself did not change his original status when he was handed over the land for a purpose and do utilize it as per the directions of the appellant, the suit landowner.

Adverting to address the ground of appeal before us, having carefully considered the oral and written submissions and the cited authorities by the contending parties together with the record of appeal, we are of the view the crucial issue to be determined at this juncture is whether the respondent was a licencee, an invitee or an adverse possessor of the suit land.

The fact that the respondent was given the suit land for a specific purpose for a period in 1994 is not disputed. The submissions from both counsel concede to this fact. The trial tribunal found in favour of the respondent for reason that he had buried a relative on the suit land and

that under Kurya customs one cannot bury someone in a land that does not belong to that person. Other factors considered included the fact that he had stayed in the land from 1999 to 2018 (12 years). In essence, the WLT found that the respondent was an adverse possessor.

On appeal, the DLHT on the other hand found the respondent to be an invitee on the suit land, invited by a friend to live in the land who managed to live in the suit land for 12 years without any conflict. However, we are settled in our minds that as an invitee, the respondent cannot acquire a right to the suit land and declared the appellant the lawful owner of the suit land. The High Court as a second appellate court found that the appellant gave the land to the respondent in 1994 to install a milling machine for his own purpose, which was executed by the respondent. The learned High Court judge was of the view that the grant of land commenced as a temporary arrangement but as time went on, the respondent built three houses of different sizes and 11 other varied constructions without description, installed a water tank, planted long-term trees and crops with the express consent of the appellant. The fact that the respondent buried his grandson in the land and the fact that the appellant and respondent are neighbours suggesting that the appellant could witness all the said developments led the learned High Court judge to find that although the land was initially given to the respondent for

five years, the status of their agreement changed after the respondent had lived in the suit land for a long time and done various developments on the suit land with an implied consent from the appellant.

The learned High Court judge further on page 127 of the record of appeal stated:

> *"If parties have lived for 23 years peacefully, the court deciding otherwise would be to create trouble and to stir still waters. Courts are not there to initiate turmoil and disruptions of long-time relations amongst individuals; rather their role and service is to protect and to maintain lawful societal coexistence of persons in their customs and traditional settings, ensuring continued peace and serenity in communities over which they have jurisdiction."*

At the end of the judgment, the learned High Court judge held that the respondent was not an invitee or a licencee under the circumstances.

Having gone through the judgment and the above stated position, the question which comes to our minds is whether the status of an invitee or licencee status can change. In the instant case, at the start of the judgment, the learned High Court judge recognized the fact that the respondent had been an invitee/licencee to the land and according to

him the status changed when he developed the land and stayed for a long time on the suit land without any disturbance from the appellant.

In the present case, the learned High Court judge on page 126 of the record of appeal stated:

> *"... although the parties might have had in mind 5 years at the beginning and CHACHA (respondent) might have been an invitee or a licencee as Mr. Bernard put it, but as time went on and exceeded five years, the grant* ***inter vivos*** *precipitated, crystallized and solidified into an absolute, permanent and irrevocable transfer of land from MAGOIGA (appellant) to CHACHA."*

The evidence before the trial court clearly established that the respondent upon being given the land for a specific purpose was in fact a mere licencee as found by the DLHT. We are alive to the principle of adverse possession that a person who does not have legal title to land may become an owner of that land, based on continuous possession or occupation of the said land. However, the principle cannot apply in circumstances where the possession roots from the owner's permission or agreement as was the situation in the instant appeal as also held as already restated above in the case of **Registered Trustees of Holy Spirit Sisters Tanzania** (supra).

In that case, recognizing the principle of adverse possession that a person without a legal title to land may acquire ownership of the land founded on incessant possession or occupation of the said land, the Court held that the principle cannot apply where the possession arises from the owner's permission or agreement. In that case, the Court adopted the position held by the High Court of Kenya in **Mbira Vs Gachuhi** [2002] 1 EA 137 stating:

> *"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 occupiers right to occupation was derived from the owner in the form of permission or agreement, it was not adverse."*

In the case of **Maigu Magenda Vs Arbogast Mango**, Civil Appeal No. 218 of 2017 (unreported) the Court adopted the findings by the High Court in several cases such as **Samson Mwambene Vs Edson James Mwanyanyingili** [2001] TLR 1, and **Makofia Merianangа Vs Asha Ndisia** [1969] HCD n. 204, on the issue of whether long occupation of land by an invitee entitle him to own land. In **Maigu Magenda** (supra) we observed:

> *"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."

The position in **Registered Trustees of Holy Spirit Sisters Tanzania** (supra) was restated in the case of **Musa Hassani Vs Barnabas Yohanna Shedafa (Legal Representative of the late Yohanna Shedafa),** Civil Appeal No. 101 of 2018 (unreported) stating:

"We wish to underline that 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 improvement on the land on which he was invited."

We are of the firm view that, with due respect, the learned High Court judge erred when upon finding that the respondent was a licencee at the start of the agreement with the appellant went on to hold that this status changed in view of the long stay and the developments he made. This is because the status of a licencee never changes as shown in the various decisions of this Court referred to herein.

We have also considered the arguments by the learned counsel for the appellant that the doctrines of acquiescence and prescriptive apply. We find that the said doctrines are but remnants governing adverse

possession, which we have found is not applicable in the instant case. In an English case of **Duke of Leeds Vs Earl of Amherst** 2Ph 117 (123) (1846) referred in a book by R.W. James and G. M. Fimbo, **Customary Land Law of Tanzania: A Source Book** page 551, it was held that the doctrine of acquiescence applies if a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act was in progress, he cannot afterward be heard to complain about it. In another English case of **Ramsden Vs Dyson** (1866) LR IHL 129 at page 140, discussing the doctrine it was held that such an inference can only be drawn where it is a stranger who deals with the land in such a manner inconsistent with the rights of the one who owns the land.

What is clear is that the doctrine of acquiescence arises from the common law principles of equity. Taking into account the instant case, we find that it does not apply where the suit land was specifically given to the respondent by the appellant and non-interference of the acts inconsistent with the agreement was not on acquiescence but in furtherance of friendship and undertaking between them, that the respondent will only occupy the land and nothing else.

We are constrained to hold that the learned High Court Judge's findings that the respondent had the right to the suit land merely so as to keep harmony and peace in the community, in the instant case, was not founded on the law, considering that there is a person who owns that land, and has not transferred or disposed of the suit land or abandoned it. Even though the High Court decision avoided declaring the status of the respondent, from the reasons advanced to find him the rightful owner of the suit land, what can be drawn is that it was based on finding the respondent an adverse possessor, which we have shown above that the respondent does not qualify to be.

The position on adverse possession is as stated in **Registered Trustees of Holy Spirit Sisters Tanzania** (supra) already alluded to herein that where a party's claim on land arises after being invited to stay on the suit land on terms prescribed, on the balance of probabilities, such a party is a mere licencee. That possession could never be adverse if it could be referred to as a lawful title.

For the foregoing, we hold that the suit land is owned by the appellant. In the end, we allow the appeal, quash the judgment and orders of the High Court, and restore the decision of the District Land

and Housing Tribunal for Tarime in Appeal No. 3 of 2019. Under the circumstances each party to bear own costs.

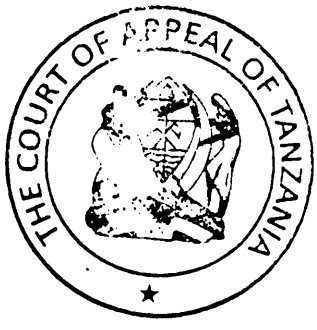
DATED at **MUSOMA** this 14th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2022 in the presence of Mr. Cosmas Tuthuru, learned counsel for the Respondent and holding brief of Mr. Innocent Kisigiro, learned counsel for the Appellant, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL