IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CIVIL APPEAL NO. 493 OF 2020

HALIMA WAKARA .... **1ST APPELLANT**
DHUHURA WAKARA .... **2ND APPELLANT**
CHANGWE CHARLES KIBHIBHI (Administrator of
the Estate of the late MABURI SAID KITANDA)............................ **3RD APPELLANT**

VERSUS

JEREMIAH M. MKAMA .... **RESPONDENT**

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

(De - Mello, J.)

dated the 21st day of November, 2017

in

Land Appeal No. 43 of 2016

....

JUDGMENT OF THE COURT

30th April & 8th May, 2024

LEVIRA, J.A.:

This matter arose from a land dispute which was referred to the District Land and Housing Tribunal for Mara at Musoma (the DLHT) by the appellants against the respondent. The land dispute centres on ownership of a piece of land located at Nyamatare area in the Municipality of Musoma, measuring 53 meters by 24 meters (the disputed land). The appellants claimed before the DLHT that the respondent had encroached on the disputed land which is their joint property and erected a building

thereon without their permission. However, they gave a different account on how they acquired its ownership. While the first and second appellants claimed that they acquired ownership having been given the same by their late father; the third appellant's ownership traced back in 1960 when he cleared the disputed land, erected a hut and invited Wakara Clement to live therein. On his part, the respondent was firm that the said land is his property as he bought it from Moshi Wakara and the late Maburi Said Kitanda (then the third applicant) on 11/7/2003.

Based on the weight of evidence adduced before it, the DLHT found the respondent's case heavier than that of the appellants. Consequently, it declared him the lawful owner of the land in dispute. Discontented with the decision of the DLHT, the appellants unsuccessfully appealed to the High Court of Tanzania at Mwanza vide Land Appeal No. 43 of 2016, the subject of the current appeal.

In this appeal, the appellants have advanced two grounds of complaints, to wit:

1. *That the learned Judge erred in law and fact for holding that the appellants herein had lost interest in the disputed land under the doctrine of adverse possession while all the ingredients of adverse possession were not met.*

2. *That the learned Judge erred in law and fact for holding that the respondent was the lawful owner of the disputed land while the person who had sold to him the said land had no capacity to do so.*

At the hearing of the appeal, both parties appeared in person, unrepresented. We note at the outset that parties herein did not file written submissions for or against this appeal. Hence, the appeal was argued orally. Having sought and obtained leave of the Court, the appellants spoke through Changwe Charles Kibhibhi, the administrator of the estate of the late Maburi Said Kitanda and third respondent.

Submitting in support of the appeal, Mr. Kibhibhi argued the first ground by faulting the High Court Judge for upholding the decision of the DLHT which declared the respondent the lawful owner of the disputed land. According to him, the High Court Judge misdirected herself when she invoked the doctrine of adverse possession in the unfavourable circumstances of the present case. His main contention was that the piece of land which the respondent claimed that he bought from Moshi Wakara and Maburi Said Kitanda in the year 2003 was located adjacent to the house of one Wakara. Therefore, it is different from the disputed land. In other words, he said, the land which Moshi Wakara sold to the respondent

as per the Sale Agreement (exhibit D1 collectively) was not the suit land. He referred us to page 26 of the record of appeal where the first appellant testified to the effect that, in 2013, the respondent approached her and requested her to sell him the disputed land, but she refused. However, in the same year, the respondent erected a house on that land and from that time the dispute arose between the parties herein.

A part from that, Mr. Kibhibhi argued further that, the doctrine of adverse possession could not apply in the circumstances of the present matter because the conditions under which the same is applicable were not met. He contended that, even if for the sake of argument, the contract of sale between Moshi Wakara and the respondent was considered to be a valid one, still counting from 11/07/2003 when they entered into that contract to 12/03/2015 when the appellants instituted their suit before the DLHT, was not 12 years within which the doctrine of adverse possession could apply. It was only 11 years and 8 months, he insisted. Therefore, according to him, it was wrong for the High Court to rely on the doctrine of adverse possession to declare the respondent as the lawful owner of the said land.

Responding to the first ground of appeal, the respondent submitted that, he bought the disputed land from Moshi Wakara on 11/07/2003.

However, on 20/07/2003, Maburi Said Kitanda approached and told him that the piece of land (disputed land) which his granddaughter, Moshi Wakara had sold to him, belongs to him (the said Maburi Said Kitanda) as he was the one who cleared it in the year 1960. He required the respondent to pay him TZS 500,000 for the stones which he had collected in that land as part of payment of the same. The respondent complied.

The respondent insisted that he was not a trespasser on the disputed land, but bought it from Moshi Wakara. Understandably, as a lay person, he attempted not to tell why the High Court Judge applied the doctrine of adverse possession in this matter. Nevertheless, he was quite sure that the Judge was right to declare him the rightful owner of the disputed land for one reason that, he bought it from Moshi Wakara.

The question as to whether the High Court Judge was justified to invoke the doctrine of adverse possession in the circumstances of this matter, need not detain us much. It is an established principle that a person who adversely (a trespasser) comes into occupation of land uninterruptedly for a period of 12 years and above is entitled to the ownership of that land by way of adverse possession - see: **Registered Trustees of Holly Spirit Sisters Tanzania v. January Kamili Shayo**

and 136 Others, Civil Appeal No. 193 of 2016 [2018] TZCA 32 [6th August 2018; TanzLII].

Being guided by the above principle, it is very clear in the present matter that none of the parties pleaded adverse possession of the disputed land. According to the record, the respondent's claim of ownership of that land occurred by way of purchase having bought it from Moshi Wakara. This fact was undisputed by the appellants save that, the first and second appellants denied recognizing the said Moshi Wakara who sold it to the respondent. They insisted that the land in dispute belongs to them as they were given the same by their late father. On his part, the third appellant maintained that the suit land belongs to him. He had no specific qualms about the respondent's assertion that he bought that land. Although it is subject for the next issue, at least for now, before winding up on the first ground of appeal, we can say, the appellants had the onus to prove their joint ownership of the disputed land which they had pleaded.

Reverting to the arguments, as stated earlier, Mr. Kibhibhi argued that the High Court was wrong to invoke the doctrine of adverse possession because even if the court had to take that indeed, the respondent bought the disputed land on 11/07/2003 as alleged, up to

12/03/2015 when the appellants instituted the suit in the DLHT, it was only 11 years and 8 months and not 12 years as concluded by the learned Judge. Therefore, the doctrine of adverse possession could not apply in the circumstances. On his part, the respondent maintained that he bought the land in dispute.

We wish to reproduce part of the High Court's decision while applying the doctrine of adverse possession to declare the respondent as the lawful owner of the disputed land; on page 199 of the record of appeal, it reads:

> "*On perusal [of the] record evidence as exhibited by **'D1'** collectively titled **"Makubaliano ya kuuza Kiwanja Mtaa wa Wakara"** dated 11/07/2003 was admitted without objection which the Tribunal took into account hence concluding that, the said sale was lawful and **second** that, the application was horribly time barred making the doctrine of adverse possession applicable, the Respondent having been utilizing the suit land for more than twelve (12) years without any interference. Sitting on their rights if any and, for this long is in my sincere opinion baseless and the appeal an afterthought.... The respondent purchased the suit land in 2003, developed his building and others, without confrontation up to*

2015, translating that the Appellants had lost interest if any, on the alleged disputed suit land."

We are settled in our mind and with respect, to hold that, since the respondent claimed that he bought the disputed land from Moshi Wakara, it was a misdirection on the part of the learned Judge to apply the doctrine of adverse possession to declare him the lawful owner of that land. This we say because, ownership over a land cannot be claimed to have been acquired simultaneously through a transfer (sale) and adverse possession. See: The **Hon. Attorney General v. Mwahezi Mohamed (As administrator of the Estate of the late Dolly Maria Enstance) and three others**, Civil Appeal No. 391 of 2019 [2020] TZCA 27 [26th February 2020; TanzLII].

Therefore, we allow the first ground of appeal, though in a different context as explained above.

Regarding the second ground of appeal, Mr. Kibhibhi submitted that the sale of the disputed land by Moshi Wakara to the respondent without involving Maburi Kitanda who was the owner of that land was improper. He referred us to page 194 of the record of appeal where, the Chairman of the DLHT referred to the testimony of the then third applicant, Maburi Said Kitanda who said, he cleared that land in 1960 and then erected a

hut. Thereafter, he allowed one Wakara Clement to live therein. Later, the respondent purchased the said land from a person who was only taking care of it, one Moshi Wakara.

Mr. Kibhibhi argued vehemently that, the said Moshi Wakara being a mere caretaker of the disputed land had no capacity to sell it to the respondent. In addition, he claimed that the contract of sale tendered by the respondent during trial and relied upon by the lower courts was nothing, but a forged document, without giving any explanation. Therefore, he urged us to find that there was no valid contract of sale between Moshi Wakara and the respondent in the obtaining circumstances of this matter and allow the appeal with costs.

In response, the respondent maintained that he bought the disputed land from Moshi Wakara in 2003. The said Moshi Wakara is one of the clan members of Wakara according to the letter written by the members of that clan to the Nyamatare Ward Executive Officer of 13/01/2005 (exhibit D1 collectively). He went on stating that the first and second appellants were not mentioned in the said letter to be members of that clan. But among others, Maburi Said Kitanda and Moshi Wakara were mentioned in that letter. The respondent was doubtful of their (the first and second appellants') claims against him.

He went on submitting that, as he stated earlier, a few days after he bought the disputed land, Maburi Said Kitanda approached him claiming that he was sent by his clan members to make a follow up on Wakara's properties. He told him that the amount of money paid to Moshi Wakara for the dispute land was not sufficient. Therefore, he asked him to buy another land and build a two-bedroom house for them. The respondent agreed. Having built the house on that other land, he handed it over to Maburi Said Kitanda. As intimated earlier on, apart from that house, Maburi Said Kitanda asked the respondent to pay him TZS 500,000.00 as compensation for his stones which he had collected therein to top up the price of that land. The respondent paid that amount and thus owed Maburi Said Kitanda nothing in respect of the disputed land.

In addition, the respondent stated that, the evidence as regards how he acquired the disputed land was supported by Tereko Wakara (DW2), a member of Wakara's clan who confirmed that indeed, Moshi Wakara sold the disputed land to the respondent and that Maburi Said Kitanda asked the respondent to buy another piece of land and built a house for them. That was the house in which Moshi Wakara was living with her (DW2), as it can be seen on page 32 of the record of appeal. Basing on that background, the respondent urged the Court to find that

he legally bought the disputed land, hence, the lawful owner of the same and dismiss the appeal with costs.

In rejoinder, Mr. Kibhibhi insisted that the Sale Agreement between Moshi Wakara and the respondent was a forged document. He thus pressed on us to allow the appeal.

Having heard the rival arguments by the parties, the issue calling for our determination is, whether the disputed land is legally owned by the respondent.

We are aware of the position of the law that, a person who does not have legal title to the land cannot pass a good title over the same to another. It is however, equally the law that, one party to a contract can release the other and substitute a third person who then undertakes to perform the released person's obligation under the old contract, depending on the agreement of the parties in the new contract under the doctrine of novation of a contract. In the **Black's Law Dictionary, 8th Edition 2004**, (Bryan A. Garner) at page 3379, the doctrine of novation is described in the following terms:

> *"The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with*

a new party.... The only way in which it is possible to transfer contractual duties to a third party is by the process of novation, which requires the consent of the other party to the contract."

In the matter at hand, it was Mr. Kibhibhi's argument that Moshi Wakara as the caretaker of the disputed land had no capacity to sell it to the respondent. As a result, the contract of sale entered between the two was invalid. Sticking to his guns, the respondent stated that he entered into a valid sale contract of the disputed land. More so, as subsequent to the purchasing of it, he built a house for Wakara's family and made additional payment to Maburi Said Kitanda who was the owner of that land.

Before we go any further in determining the issue we have just raised, we find it apposite to revert to the issue of joint ownership pleaded by the appellants. We have carefully examined the record of appeal but we could not find any material suggesting that the appellants owned the disputed land jointly. In their testimonies on pages 26 and 27 of the record of appeal before the DLHT, the first and second appellants respectively, claimed that they were given the suit land by their late father. However, they did not disclose who their father was. The third appellant gave a different version to the effect that, the disputed land was his personal

property as he cleared it in 1960 since it was a forest. Without taking much time, it is apparent from the record that, the appellants failed to prove their joint ownership of the disputed land. In the circumstances, we are of the settled opinion that the High Court committed no wrong for not declaring them the lawful owners of the disputed land.

Back to the pending issue as to whether the disputed land is legally owned by the respondent. It is straight from the record that initially, the land in dispute was owned by the late Maburi Said Kitanda. The record reveals further that, Moshi Wakara was a grandchild of Maburi Said Kitanda and she was living in her grandfather's house. She took advantage of their relationship and sold the disputed land to the respondent at a price of TZS. 230,000.00. Legally, the fact that such relationship existed between the two could not give her the right to pass a good title over the disputed land to the respondent. However, upon hearing about the sale, Maburi Said Kitanda, did not take action against Moshi Wakara, instead, out of feeling that the amount paid to Moshi Wakara was not sufficient and he did not get anything as the owner, he approached the respondent and set new contractual terms over the same subject matter by requiring the respondent to build a house for the Wakara family in another area and pay him TZS. 500,000.00, which he did.

In our considered view, the actions of Maburi Said Kitanda, notwithstanding the fact that, initially, he was not the one who entered in a sale agreement with the respondent, amounted to endorsement of the same. We thoroughly examined the original record of appeal and observed that, on the proceedings of 14/10/2015, Maburi Said Kitanda (PW3) testified to the effect that:

> "*The respondent purchased from a person we had asked to take care of the hut known as Moshi Wakara, ... I had no problem with that part he was given.* ***The problem is that the respondent is now expanding his land illegally."***
>
> [Emphasis added].

In cross examination, he said:

> "*Moshi is a relative of the first and second applicants. They share a grandfather.* ***She is the one who sold a piece of land to the respondent.*** *Moshi's decision to sell a piece of land was wrong* ***but we did not take it as a problem, we left it as it was. The problem is that the respondent is extending that part*** *and invading other peoples' land."*
>
> [Emphasis added].

In defence, as per the proceedings of 19/01/2016, the respondent testified to the effect that:

> *"On 11/7/2003 Moshi Wakara sold me the disputed land which was open and located at Nyamatare for Tshs. 230,000/=. There were witnesses.* ***On 20/7/2003 Mzee Maburi Kitanda Said came to the area at Nyamatare and told me that Moshi Wakara has told him that she has sold an open/empty piece of land at Nyamatare.*** *He then told me that he was the one who cleared it in 1960 from a point down side .... So* ***Mzee Maburi told me that the amount Moshi sold me the land was low comparing to the area.*** *Also, that because he was the one who cleared the land and* ***did not get anything from the sale by Moshi****, I should consider him in payment.* ***We talked and agreed and I paid him Tshs. 500,000/=*** *in two instalments; Tshs. 300,000/= and then Tshs. 200,000/= Mzee Magafu witnessed it.* ***We did not put it in writing.*** *Also, Mzee Maburi talked to his relatives and came after two weeks and told me that* ***I erect them a house at different place because their land that had remained was a small one*** *.... I continued to prepare my land at Nyamatare. I asked for building permit. The*

Municipal Officer came to inspect the land. ***Mzee Maburi was involved and he stated that he had given me that land after I had given them another land I had purchased to exchange. He admitted to have been compensated Tshs. 500,000/= by me.*** *The Municipality after being satisfied they issued me with a building permit."*

[Emphasis added]

We further take note, that the above piece of evidence by the respondent was not controverted during cross examination by Maburi Said Kitanda. It is trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. See: **Athanas Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992 (unreported) and **Principal Secretary, Ministry of Education and Attorney General v. Charles Mwita Magubo**, Civil Appeal No. 230 of 2017 [2020] TZCA 388 [11th May 2020; TanzLII].

In the present case, Maburi Said Kitanda did not cross examine the respondent when he testified that: "*... because he was the one who cleared the land and did not get anything from the sale by Moshi, I should consider him in payment. We talked and agreed and paid him Tshs. 500,000/= .... he stated that he had given me that land after I had given*

them another land I had purchased to exchange." This piece of evidence confirms what Maburi Said Kitanda testified when he stated that, being the owner of the dispute land, he had no problem with the sale done by Moshi Wakara. He blessed it and entered into an agreement with the respondent for further consideration of payment which was in cash and in kind.

With this abundant evidence on record, we find that there was a creation of a new contract between Maburi Said Kitanda and the respondent. The fact that Maburi Said Kitanda consented to the sale of his land to the respondent when he was informed by Moshi Wakara and went ahead to set new terms which were fulfilled by the respondent, signifies that there was novation of a contract. By discharging new terms set by Maburi Said Kitanda, the respondent substituted him to undertake to perform the obligations which would be performed by Moshi Wakara. This has been well reflected when the respondent applied for a building permit, Maburi Said Kitanda was involved and he confirmed that he had sold the disputed land to the respondent as he said: *Mzee Maburl was involved and he stated that he had given me that land after I had given them another land, I had purchased to exchange. He admitted to have been compensated Tshs. 500,000/= by me.*

In the circumstances, much as we agree with the appellants that the respondent did not acquire good title over the dispute land through the initial agreement with Moshi Wakara, the subsequent contact with the true owner validated his ownership over the said land. He presented heavier evidence than the appellants. Save for the first ground of appeal which we have allowed, we find this appeal unmerited and accordingly dismiss it with costs.

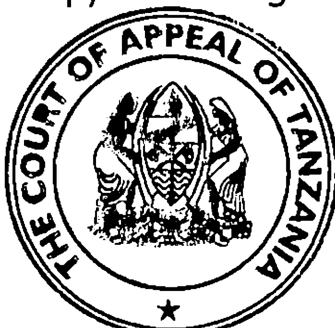
DATED at **MWANZA** this 7th day of May, 2024.

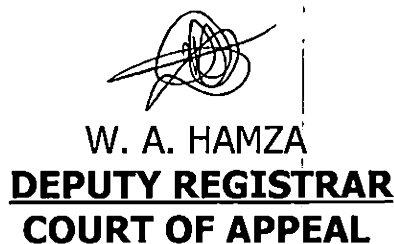
G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 8th day of May, 2024 in the presence of the 3rd Appellant in person and the Respondent through video link (WhatsApp videocall) as he is sick. The 1st appellant and 2nd appellant are absent reported to be sick by the 3rd Respondent, is hereby certified as a true copy of the original.





W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL