

IN THE HIGH COURT OF TANZANIA

AT MWANZA

MISCELLANEOUS LAND APPEAL NO. 72 OF 2012

**(Appeal from the District Land and Housing Tribunal for Geita, Original from
Nkome Ward Land and Housing Tribunal dated 23rd February, 2012)**

MARY CHOZA & 2 OTHERS.....APPLICANTS

VERSUS

MABAGALA MTWALE & 4 OTHERS.....RESPONDENTS

JUDGMENT

BUKUKU, J.:

This is an appeal against the decision of the District Land and Housing Tribunal for Geita, in Appeal No. 03 of 2012 originating from Nkome Ward Land and Housing Tribunal.

Briefly, the appellants are siblings. They have a brother by the name of Alphonse Choza. (1st respondent herein). They had a clan land which they were bequeathed by their father. Allegedly, sometimes in 2004, this Alphonse, sold the said clan land to third parties, to wit, the 1st, 2nd, 3rd, 4th and 5th respondents herein. Aggrieved, the appellants filed a suit at the Nkome Land and Housing Tribunal. The Ward Tribunal decided in the

appellant's favour and their brother Alphonse was ordered to pay compensation of T.shs. 1.0 Million by 15/7/2011. Still aggrieved, the appellants appealed to the District Land and Housing Tribunal at Geita. On 23rd February 2012, the District Tribunal dismissed the appeal on grounds that, the suit was time barred. Still not satisfied, the appellants are now before this court appealing against the judgment of the District Land and Housing Tribunal at Tarime.

In their petition of appeal, the appellants have raised five grounds of appeal. Having gone through them, I find that their appeal hinges on the year as to when the sale of the land was conducted, and limitation. The said grounds are as follows:-

1. That the District Land and Housing Tribunal erred in law and fact in entering a judgment in favour of the respondents without sufficient evidence to prove in which year they bought that shamba from Mr. Alphonse, hence to reject forth rightly our claim.
2. That the fact condition (sic) is that, the shamba was sold in 2004 not in 1994.

3. That the matter is not past for reason that the land was sold in 2004 not 1994 as the District Land and Housing Tribunal judgment indicated.
4. That no any evidence submitted with their respondents (sic) to the Nkome Ward Land and Housing Tribunal show that they bought shamba in 1994.
5. That, as a whole the decision of the District Land and Housing Tribunal is against the evidence on record and the law applicable.

When the appeal was called on for hearing, parties appeared in person. On the part of the appellants, Ms. Mary Choza submitted that, the plot was sold in 2004 and not 1994 as alleged and thus the suit was not time barred.

The first respondent Mr. Mabagale Mtwale countered by submitting that, they do not know the appellants. It is their brother who they know, one Alphonse Choza who is the one who sold them the land in 2004. According to Mr. Mtwale, he paid in installments and after that, Alphonse asked him to vacate the land. He then filed a case and won and Alphonse was ordered to pay costs of the suit. According to Mr. Mtwale, the appellants filed a suit for vacant possession at the Ward Tribunal. The

Ward Tribunal awarded them compensation but before they were given that amount of money, the appellants appealed at the District Land and Housing Tribunal and the tribunal found against them, hence this appeal. He thus prayed that the appeal be dismissed.

As far as the second respondent Mr. Charles Kasamwa is concerned, he submitted that, he bought the plot of land since 2002 and paid in installments. Having gotten the land, he established himself and is now living with his family.

In essence the whole issue hinge on the sale of the clan land which, the appellants wants to claim it back. It is not disputed that, one, Alphonse Choza, the appellant's brother, sold the suit land to non clan members without prior approval of the appellants. The trial tribunal, having heard both parties, entered judgment for the appellants herein and ordered Mr. Alphonse to pay compensation of T.shs. 1,000,000/= to the appellants in accordance with section 16 (iii) of Act No. 2 of 2002. According to the judgment of the trial tribunal, the suit land was sold in 2004 following the death of the appellant's father.

Admittedly, it is trite that, clan land cannot be sold to non clan members without prior approval of other clan members. The said Alphonse had no colour of right to sell the clan land to the respondents who were non clan members without the appellant's consent. Since the said clan land has already been sold since 2004 (10 years now), what then is the remedy to the appellants.

Before delving into the issue of the consequences of the sale of the suit land, I need to satisfy myself on the issue of limitation which had been raised by the appellate tribunal. In his judgment, the appellate tribunal found that, the respondents herein bought the suit land in 1994 and have been occupying the same peacefully for fifteen years up to the time they were sued by the appellants.

With greatest respect to the chairman of the tribunal, throughout the record, there is no piece of evidence to prove the same. According to the testimony of Alphonse, the one who sold the clan land, in 2000, his son died. The death of his son confused him so much that he decided to move out from their village. That is when he decided to start selling part of the land without consulting his sisters. Again, it is on record that, the appellant's father passed away in 2004 and again this Alphonse decided to

sell another piece of land in order to get money for his father's funeral. He did so without consulting his sisters since they were not in the village at that time.

In its totality, that, the appellant's brother, Alphonse started disposing off the clan land way back in 2000, with or without the knowledge of the appellants. I am saying so because, at the hearing of this appeal, the second respondent, one Charles Kasamwa, told this court that, he bought the piece of land in 2002, from Alphonse, and the first respondent, Mabagala Mtwale said he bought his land in 2004. Not only that, in their joint reply to the petition of appeal filed by the respondents herein in miscellaneous land Appeal No. 72 of 2012, the appellants had this to say in paragraph 4 of their reply:-

"That, the respondents denied the contents of paragraph 4 of the petition of appeal. Further, the respondents said that, the evidence of the Ward Tribunal shows that, the respondents bought the land from one Alphonse Choza in different times in 2004, 2002 and 2005."

All in all, since there is no evidence to show that the respondents bought the land in 1994, it is my considered opinion that, when the suit was filed at the Nkome Ward Tribunal, it was not time barred. Even if the seller started selling the land after his son's death in 2000, still by 2010 when the suit was instituted, it was still within the limitation period of twelve years.

With the above findings, I hold that, the District Land and Housing Tribunal erred in law and fact by dismissing the appeal on grounds of limitation against the evidence on record and the law applicable. Therefore, I find the appeal to be meritorious, and I thus quash the decision of the District Land and Housing Tribunal.

Having quashed the decision of the District Land and Housing Tribunal, we remain with the decision of the trial ward tribunal. In its judgment, the Nkome Ward Tribunal entered judgment in favour of the appellants and ordered the appellant's brother, (who is not one of the respondents herein), to pay the appellants compensation to the tune of T.shs. 1,000,000.00/=. It was further ordered that, the said sum should be paid by 15/7/2011.

The said judgment notwithstanding, there is one thing on the record that needs to be put clear. The record shows that, on 19th January 2012, the said Alphonse filed his reply to the petition of appeal at the District Land and Housing Tribunal. In the said reply, Mr. Alphonse claimed that, he was ordered by the Ward Tribunal to pay compensation of T.shs. 1,000,000,00/= to the appellants, but before he paid, the same Ward Tribunal ordered him not to pay the appellants, but rather, he should pay the respondents herein, and that, he had already paid them.

According to Mr. Alphonse, he had already paid back to the respondents T.shs. 600,000/= being cash money he received for the sale of the land and T.shs. 400,000/= as compensation for their unexhausted improvements. He is thus surprised as to why the respondents are still in the suit land while he has already paid back as ordered.

I have to admit that, this piece of information on record has tasked my mind. There is nothing on record to show that the Ward Tribunal varied its decision dated 18/3/2011 which ordered Mr. Alphonse to compensate the appellants T.shs. 1,000,000.00/=. Surprisingly, it is on record that, following the decision of the trial tribunal on 18/3/2011, the appellant's

brother Alphonse made the following payments to the respondent's herein:-

Date	Payment made
29/5/2011 -	T.shs. 300,000.00
19/7/2011 -	T.shs. 200,000.00
9/9/2011 -	T.shs. 500,000.00
Total	T.shs. 1,000,000.00

All the above payments were allegedly made at the offices of the Nkome Ward Tribunal, witnessed and stamped.

To my utter surprise, when Appeal No. 3 of 2012 was heard at the District Land and Housing Tribunal on 8/2/2012, the respondents denied to have received any monies. Let the proceedings of that day speak by itself:-

"8.2.2012

Kitungulu, E. – Chairman

E. Maduhu T/S

Mrs. Kinuno – Member

Mr. Mabula – Member

For Appellant – 1st, 2nd present.

For Respondent – All absent.

Appellant's submission

We were claiming a land not money. The Ward Tribunal ordered that we paid (sic) T.shs. 1,000,000/=. So we want back our land.

Reply

I was ordered to pay One Million and I have already paid to the 2nd, 3rd, and 4th respondents.

Appellant's

The first respondent is our brother, he sold the land to the rest of the respondents.

2nd, 3rd, 4th respondents.

We have not received any money.

Order: Judgment on 23rd February, 2012

Kitungulu, E

Chairman

8th February 2012."

Unfortunately, having gone through the judgment of the District Tribunal, the issue of payment of compensation was never canvassed and therefore nothing was said about it though it was one of the grounds of appeal raised by the appellants. What the District Tribunal addressed itself, was the issue of limitation only, which, as already narrated, the tribunal had misdirected itself.

From the above, it is evident that, the decision of the District Land and Housing Tribunal was against the evidence on record. Considering that the trial tribunal had ordered payment of compensation to be paid to the appellants, but for whatever reason it is alleged that the compensation was paid to the respondents, who also claim not to have received any monies, I have no option other than to order that, the matter be referred back to the trial tribunal which will determine as to whether the respondents were paid or not. In the event it is proved that the respondents were paid compensation, the tribunal should proceed to make necessary orders as shall be prudent in the determination of this matter Each party to bear own costs.

Ordered accordingly.

Right of appeal explained.

A.E. BUKUKU

JUDGE

Delivered at Mwanza

This 12th June, 2014