IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

MISC. LAND CASE APPEAL NO. 17 OF 2019

(C/F Misc. Application No. 175 of 2017 C/f Misc. Application No. 8 of 2008,District Land and Housing Tribunal for Moshi, Original Madai Case No.8/2007 from Mabogini Ward Tribunal)

ROBERT FRANCIS TESHA..... APPELLANT

VERSUS

CONRAD SAILI..... 1ST RESPONDENT

MABOGINI VILLAGE.....2ND RESPONDENT

KAHEMA (LONZADU AUCTION MART) .....3RD RESPONDENT

JUDGMENT

9/7/2020, 7/8/2020

T. Mwenempazi, J

The appellant is appealing against the decision of the District Land and Housing Tribunal of Moshi dated 20/9/2019 by P. J. Mkwandi, Chairman in Application No. 175 of 2017 which was dismissed for lack of merit. The dismissed application was for stay of demolition order passed in Misc. Application No.8 of 2009 by the District Land and Housing Tribunal of Moshi in the application the applicant also sought for an order to be declared the owner of the suit premises. The district tribunal ruled in favour of the respondents and the appellant was aggrieved hence preferred this appeal raising six grounds to wit: -

1. That the chairman of the District Land and Housing Tribunal erred in law and in fact by affirming the Ward Tribunal Decision which allowed the 1st respondent to continue owning the suit land while in fact he never owned it and that he appellant has owned the same for more than 30 years without interruption.
2. That the learned chairman erred in law and in fact by affirming the ward tribunal's decision in which the value of the subject matter was not ascertained and in fact exceeded the jurisdiction of the two tribunals.
3. That the learned trial chairman erred in law and in fact by failure to grasp ownership of the appellant of the suit land by adverse possession
4. In the alternative to ground number three, the learned trial chairman erred in law and in fact by failure to grasp evidence by both parties that appellant was allocated the land by authorities since the year 1983.
5. That the learned trial chairman erred in law and in fact by finding that the appellant's tittle over suit land was fraudulently acquired simply because the first respondent had an order through Madai Case No. 8/2007 from Mabogini Ward Tribunal mentioning the land which one Robert Tesha built a hotel.
6. That the learned trial Chairman erred in law and fact by awarding compensation to the 1st respondent on basis that it was settled by office of regional commissioner that the applicant to compensate the 1st respondent Tshs. 300,000,000/= for the land, mental anguish and

loss of income without proof and without according the appellant right to be heard.

History of the dispute shows that the 1st respondent herein named entered into an agreement with the Mabogini village and exchanged a piece of land measuring two acres. It was on the 12/3 /1983. The second respondent's farm is situated at the middle of the village and they offered him an alternative plot on the North side of the village. However, the alternative plot turned to be the property of Victoria Felise. At the time of agreement, the leader of the village, the Village Chairman was Abdul Makore. They went to the 2nd respondent to ask for the piece of land so that they build offices for CCM party. It shows, according to the record the 2nd Respondent never enjoyed the space he was given instead he ended up in dispute todate.

In the Ward Tribunal, the 2nd appellant filed a suit against the village of Mabogini, who never entered appearance until the dispute was heard exparte. In the ward Tribunal of Mabogini Ward the Honourable Members of the Tribunal decided in favour of the 2nd Respondent and their decision was coached as follows: -

"Baraza baada ya kupitia maelezo na vielelezo katika Mwongozo..... wajumbe wameamua kuwa mdai Conradi Saili arudishiwe eneo lake la Eka mbili kutokana na mkataba kutoheshimiwa kwa Zaidi ya miaka 25"

The decision was delivered on the 7th October, 2008 and a right to appeal was explained. The record shows no appeal has ever been filed until now. However, the applicant filed in the District Land and Housing Tribunal of

Moshi an application for execution which was registered as Miscellaneous Application No. 8 of 2007(Originating from Mabogini Ward Tribunal). On the 8th April, 2009 the application was allowed and Kahema Auction was appointed to execute.

The trail of events show that the eviction order was returned unexecuted by Chondry w. Kahema t/a Lonzadu Auction Mart and filed in court on the 3 July 2009. Instead of eviction order the Court Broker prayed to be issued with demolition order as the dispute land has been developed by Robert Tesha with more than 30 rooms in a form of self-contained compartments under the name of New Green Hostel. The demolition order was issued on the 13th October, 2009. Along with the issuance of the demolition order the Mabogini Village Council came up with an application by way of Chamber Summons supported with an affidavit of one Nuhu I. Mnango. They allege not to be served with any document in the Ward Tribunal and that is the reason the hearing went exparte. The applicant Mabogini Village Counsel is applying for the stay of execution and an order for revision. It is very unfortunate the application is not registered though it was received by the District Land and Housing Tribunal of Moshi. I have noted also the Village Counsel was being served by E. G. Kipoko Advocate.

The record shows that the application whose ruling is being appealed against was filed on 27th July, 2017. It was filed by Robert Francis Tesha. The orders sought are

1. That the Honourable Tribunal be pleased to stay the demolition order passed in a Miscellaneous Application No. 8 of 2009 in the District Land and Housing Tribunal at Moshi and investigate the ownership of

the suit premises situated at Mabogini Village in Moshi District with title No. 34643 L.O. No. 78132, MS/LD/1015/PLOT NO. 1015;

2. That, the suit premises be discharged from the execution and the tribunal affirms the applicant as the owner of the suit premises.

In the ruling to the application, the Honourable Chairperson of the District Land and Housing Tribunal found that the suit land belong to the 2nd Respondent and in a way confirmed the decision of the Mabogini Ward Tribunal. In consideration to the development done at the dispute land, the Chairperson referred to the settlement facilitated by the Regional Commissioners office and ordered the appellant to compensated the 1st Respondent at the tune of Tshs. Three Hundred Millions only for land, mental anguish and the lost of income; he also condemned the applicant to pay for the cost of the suit. The present appeal is against that background. He prays the appeal to be allowed, the decision of the District Land and Housing Tribunal and that of the Mabogini Ward Tribunal to be reversed and this court to order that:

a) The case be heard afresh before the court of competent jurisdiction.

b) Cost of this appeal be paid by the Respondents jointly and severally.

At the hearing of the appeal, the court granted leave for the parties to dispose the appeal by way of written submission. The appellant was being served by Mr. E. G. Kipoko, learned advocate and the 1st Respondent was being served by Ms. Doris Kinyoa, learned advocate.

In his submission in support of the appeal the learned advocate Kipoko, E.G. for the Appellant simply restated the appellant's grounds of appeal and added that that the two decisions of the trial ward tribunal and the appellate tribunal were not based on evidence. Secondly, that the Ward Tribunal lacked jurisdiction over the suit land as the same was not ascertained and it in fact exceeded the jurisdiction of the two tribunals. Thirdly, that the appellant has owned the suit land for more than thirty years by adverse possession. Fourthly, that the evidence establishes the appellant ownership of the suit land. On the fifth ground he stated that there was no proof of fraud. Lastly on the sixth ground he stated that the appellant was denied the right to be heard. For those stated reasons he prayed for the case to be heard afresh before the court of competent jurisdiction and cost of the appeal to be paid by the respondents jointly and severally.

Responding to the submission by the applicant, Mr. Dennis Kinyoa learned counsel for the 1st respondent submitted on the first ground of appeal that the contention that the two decisions of the trial tribunal and the appellate tribunal were not based on evidence is misconceived. In her view, the two tribunals were right in deciding that the suit land belongs to the 1st respondent based on evidence that the 1st respondent purchased the same from one Mwamvita Juma and the copy of the sale agreement was annexed in his counter affidavit as annexture P1. That evidence was tendered during hearing of the matter in Application No.8/2007. The counsel submitted further that the appellant never showed how he acquired the said property therefore he was a mere trespasser. The

counsel maintained that the tribunal's decision cannot be faulted because it was founded on evidence adduced before them which was sufficient credible and reliable.

On the second ground of appeal the counsel replied that according to section 15 of the Land Disputes Courts Act, 2002 the jurisdiction of the tribunal is limited to land valued at three million shillings. Therefore, the tribunal had jurisdiction to entertain the matter because the 1st respondent purchased the suit plot in the year 1972 at the price of Tshs. 720/= and by the time the case was heard the value must have increased since the value of the land always appreciates.

In response to the third ground of appeal the counsel has submitted that the allegation by the appellant that he has owned the suit land for over 30 years is unfounded as there is evidence to that effect. The counsel argued that in absence of evidence of long uninterrupted possession of the suit land the rule of adverse possession cannot stand. To emphasise her point the counsel cited the case of ***Lemayani v. Mhavi (1972) HCD. 149.*** **In** that case it was held that: -

> *"moreover, the trial court found that the father went into possession in 1960 so possession adverse to the Respondent was not more than twelve years, and this was not long enough for the appellant to establish his claim"*

On the fourth ground the counsel responded that the issue of the appellant being allocated the land by authorities since 1983 is not true and unfounded. On the contrary the counsel submitted that the 1st respondent on divers dates in the year 1983 entered into agreement with the 2nd

respondent with respect to the suit land where the 2nd respondent was given the suit land in exchange with another land that the 1st respondent was given to use until it was successfully claimed by one Victoria Felise. Later on, the 1st respondent claimed against the 2nd respondent via **Madai case No.8/2007** where it was decided that the 1st respondent to continue own his former land that is the suit land.

On the fifth ground the counsel replied that the title deed by the appellant was processed on the year 2011 and by the time the execution order with respect to Madai case No.8/2007 had already been issued by the District Land and Housing Tribunal therefore the title deed was fraudulently procured as there was a valid court order already. Also, he argued that the act of the appellant to construct a hotel over the suit land was unlawful because the land never belonged to him.

Finally, in reply to the sixth ground of appeal the counsel replied that as per records all parties were accorded an opportunity to be heard. In support to the damages awarded to the 1st Respondent the counsel cited the case of ***Cooper Motor Corporation Ltd v. Moshi Arusha Occupational Health Services (1980) TLR 96*** where it was held that: -

> *"general damages need not be specifically pleaded; they may be asked for by a mere statement or prayer of claim."*

The counsel further submitted that since the principle of quantum of damages is to restore an injured part as far as possible to the position prior to the injury the tribunal was legally justified to invoke its discretionally powers and awarded the 1st respondent 300,000,000/= as general

damages. The counsel concluded by praying that the appeal be dismissed with cost as it is devoid of any merit and intends to defeat justice.

In rejoinder submission the counsel for the appellant submitted that the evidence of sale agreement referred to by the 1st respondent annexed in ***Misc. Application No. 175 of 2017*** should not have been acted upon because it was not paid up stamp duty and also the 1st respondent never testified or give evidence to have used or occupied the suit land instead it is the appellant who has occupied and substantially developed the suit land as deponed in his affidavit.

On the issue of obtaining a title deed in the year 2011 the counsel submitted that the same was not fraudulently obtained by the appellant because he was not made a party when the 1st respondent was litigating against the 2nd respondent. He argued that the appellant was condemned unheard by the trial ward tribunal and when he objected to execution before the District Land and Housing Tribunal its decision was influenced by the Regional Commissioner who had no such power. Under such circumstance it is right for this court to interfere with the decisions of the two tribunals and nullify the proceedings. On the other grounds the counsel reiterated what he submitted earlier and prayed for the court to allow the appeal and order the case to be heard afresh before the court with competent jurisdiction.

I have heard an opportunity to read the records of the lower tribunals, grounds of appeal and submissions by the appellant and the 1st respondent. The submission, that the decisions in the lower tribunals are not backed up by the evidence, is not supported by the available record. I

have read and I have satisfied myself that the evidence was considered in the decisions of both tribunals and the point is intended to mislead this court. It is thus dismissed.

It is not disputed that the 1st respondent commenced a dispute against the 2nd respondent on the suit plot at the Ward Tribunal. The appellant at the time was occupying the suit plot. The 1st Respondent is recorded to have testified that:

> *"Eneo hilo langu hadi sasa linamilikiwa na Nd. Robert Tesha ambaye amejenga Hotel."*

However, as I have shown above, the appellant had the Village Counsel of Mabogini as the party privy to their agreement. And upon failure by the village counsel to enter appearance a decision was made to give back the land to the 1st Respondent which in my opinion it was proper.

As to the jurisdiction, still I believe, it was not the issue to detain the 1st Respondent to pursue his right. So far at the time, there was nothing done by the village of Mabogini, if we stick by the agreement. The CCM office was not built, whoever did anything is a trespasser as would be any trespasser to the land belonging to another. The only solution is leave vacant possession of land in dispute. Moreover, according to the case of ***LWESHABURA MZINJA V. JULIETA JACOB, HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR, MISC. LAND APPLICATION NO. 7 OF 2005***

> *"... The Court cannot estimate the value of land on speculation, this means that in practice, any challenge (Preliminary Objection) needs to be supported by evaluation report ..."*

The appellant in the appeal and his submission has raised an argument that he is the owner of the dispute land by adverse possession. It was decided in the case of ***Bhoke Kitang'ita Versus Makuru Mahemba, Civil Appeal No. 22 of 2017, court of appeal of Tanzania at Mwanza(unreported)***

> *"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."*

In the same case the court went on to observe and hold as follows, I will quote extensively;

> *"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****;*

(I) 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 right 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."

In this case, the 1st Respondent has not at any time been proved to have abandoned his piece of land which is now in dispute. The record in the Ward Tribunal of Mabogini show the 1st Respondent has been in pursuance of the farm, two (2) acres since 1991. That was 8 months from 1983 if we assume, he had abandoned the farm and it further proves he was still within the 12 years required by the Law of Limitation Act, Cap. 89 R.E.2002. Further to that, the appellant has not shown how he came into possession of the dispute property save for the claim to do so by adverse. possession but he again has not shown when he came into possession to the dispute property.

For the reasons shown herein above I find the appeal has no merit and it is therefore dismissed with costs. It is ordered accordingly.

DATED and DELIVERED at Moshi this 7th day of August, 2020.

T. Mwenempazi
Judge
7/8/2020