IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

LAND APPEAL NO. 75 OF 2019

(Originating from District Land and Housing Tribunal for Karatu at Karatu in Application No. 39 of 2015)

CELINA JACOB @MOLLEL ..... APPELLANT

VERSUS

SAMSON ELIAS ..... 1ST RESPONDENT

MAGRETH NIIMA @GWANDU ..... 2ND RESPONDENT

JUDGMENT

1st July & 28th August, 2020

Masara, J.

The Appellant lodged an application in the District Land and Housing Tribunal for Karatu against the two Respondents praying to be declared the lawful owner of the suit land. She claimed to have bought a piece of land measuring 35 paces length and 25 paces width, located at T.F.A area within Karatu Urban Centre in the year 1987. She bought it from the Shamba of the late Bi Muhale Dawii for a price of Tshs 5000/=. She built a mud house and started living thereon. In 1991 she built a 3 rooms brick house and in 2015 the first Respondent appeared alleging that the Appellant had built the house on his land. According to the Appellant, the land in dispute measures 25 paces length and 12 paces width. The Respondent then built a two-room house on the disputed land.

The first Respondent is the son of the second Respondent who claimed to have been allocated the suit land by her mother (second Respondent). The second Respondent on the other hand claimed to have bought the suit land from one Josephat Ngaida at a consideration of Tshs 20,000/= on 20th December, 1989. The said Josephat Ngaida acquired the suit land from Amma Muhale in 1986 as he had been taking care of the late Amma Muhale due to her old age and sickness. The second Respondent considered the suit land subject of this case to be 25 paces length and 18 paces width. The second Respondent contended that at the time she bought the suit land there was Appellant's mud house on her south side. In 1991, she built a mud house thereon and in 2013 she gave it as a gift to his son, the first Respondent.

The Trial Tribunal declared the Respondents the lawful owners of the suit land measuring 25 paces length and 18 paces width. The basis of the Trial Tribunal's finding was that the Appellant failed to prove the extent and the size of the trespassed land by the Respondents and the fact that the Respondents' evidence was stronger compared to that of the Appellant. The Appellant was dissatisfied by that decision, she has thus come to this court appealing against the said decision on the following grounds:

a) *That, the Honourable Chairman erred both in law and fact by holding that the Appellant has failed clearly to prove the extent and size of the Land in dispute;*
b) *That, the Honourable Chairman erred in law by holding that the evidence adduced by the Respondent proved her case on the balance of probabilities despite the fact that he doubted the evidence; and*
c) *That, the Honourable Chairman erred in law and fact for failure to evaluate the evidence on record properly.*

At the hearing of the appeal the Appellant and Respondents in person unrepresented. By the consent of the court it was resolved that the appeal be argued through filing Written Submissions.

Before submitting in relation to the grounds of appeal, the Appellant submitted that any claim by the Respondents over the suit land is time barred. She contended that since the Appellant bought the suit land in 1987 and occupied it up to 2015, then she has acquired the same as she stayed over the suit land for quite a long time. To underscore her argument, she cited the case of ***Masubo Karera Vs. Marwa Nyanonkwa*** (1967) HCD No. 436 which held that courts are mandated to protect those who have been in possession of land for a long period of time.

She further cited the provisions of section 3(1) read together with item 22 of Part 1 of the 1st schedule to the Law of Limitation Act, Cap 89 [R.E 2002] which provides for 12 years as the time limit in suits to recover land. The Appellant reiterated that even the second Respondent was in agreement with the Appellant that she had been in possession of the suit land undisturbed from 1989. She therefore faulted the trial Tribunal Judgment for deciding in favour of the Respondents terming it as unjust judgment.

Submitting on the first ground of Appeal, the Appellant faulted the findings of the Trial Tribunal stating that they are unfounded and misconceived. Alternatively, she argued that the record is clear that the Appellant bought a total area measuring 35 paces long and 25 paces width from the late

Muhale Dawii referring to page 13 of the proceedings. She added that while being cross examined by the Tribunal assessor Mr. Ackonay, the Appellant responded that the area in dispute is 12 by 25 paces as reflected at page 15 of the proceedings.

On the second ground of appeal, the Appellant stated that she discharged her duty to prove her case as per the provisions of section 112 of the Tanzania Evidence Act, Cap 6 [R.E 2002]. She proved her ownership over the suit land by issuing the Tribunal with a copy of the sale agreement evidencing that she bought the suit land from the late Muhale Dawii.

She blamed the Tribunal for failure to visit the *locus in quo*, measure it and come up with the real size as reflected in the sale agreement. She further holds the Tribunal irresponsible for believing the testimony of DW3 Josephat Ngaida who purported to sell the suit land to the second Respondent as he did not furnish evidence on how he acquired the land from Muhale Dawii, and also the fact that he did not involve her during the sale of his land to the Respondent. She invited the court to consider the evidence of the Respondents' witnesses together with the documentary evidence tendered by the Respondents who all together acknowledge the presence of the Appellant on the suit land even before the second Respondent had bought her land.

Elaborating on the third ground, the Appellant maintained that the Tribunal failed to evaluate the evidence adduced by parties before arriving to a

decision. She stressed that the Appellant's evidence was strong compared to the weak evidence given by the Respondents. In her view, since she had uninterrupted enjoyment over the suit land from 1987 to 2015 when the dispute arose, the Tribunal was not legally justified to reach the conclusion it did as it was not supported by the facts and evidence on record. To foster her argument, she cited the Court of Appeal decision in ***Ashraf Akber Khan Vs. Ravji Govind Varsan***, Civil Appeal No. 5 of 2007 (unreported) which emphasize on the proper scrutiny in evaluation of evidence.

Reacting on the concern put forward by the Appellant regarding the competence of the appeal, the Respondents sought reliance on the evidence of DW3 who agreed to have sold the land to the 2nd Respondent. It was DW3's testimony that before selling the land to the second Respondent, the Appellant was her neighbour and they never had dispute, therefore the Tribunal was right in holding the Appellant's claim as time barred since the Respondents were in possession and use over the suit land uninterruptedly since 1989. The Respondents concluded that the Appellant's claim is either time barred or unfounded.

Contesting the first ground of appeal, the Respondents submitted that the Appellant's purported sale agreement does not give clear description of the parcel of land in terms of boundaries worthy relying by the Tribunal. They therefore averred that what the Appellant stated in her submissions is an afterthought which cannot be relied upon by this Court to render just decision.

Submitting on the second ground of appeal, the duo contended that they proved beyond peradventure on how the second Respondent lawfully purchased the suit land from Josephat Ngaida and his wife Magreth Ngaida by producing the sale agreement which state clearly the demarcations and boundaries. Having done so, the Respondents went on stating that they have never gone beyond the boundaries as per the sale agreement. In their view, this evidence proved their case on the balance of probabilities as required by the law and, therefore, the Chairperson was right in so holding.

Submitting against the third ground, the Respondents applauded the reasoning of the Tribunal Chairperson arguing that it was clear that the evidence adduced by the Respondents was strong enough to be outweighed by the evidence adduced by the Appellant which was scanty and shaky.

I have tangibly gone through the grounds of appeal and the rival submissions of the parties regarding this appeal. The main issue for determination in this appeal is whether the appeal should be sustained on the grounds made by the Appellant.

Before venturing into the issue above, I wish to comment on the issue of adverse possession sought to be relied by the Appellant in her submissions. The Appellant claims that the Tribunal was wrong in holding that the Appellant did not take legal action against the Respondents' invasion to the suit land without considering that the dispute arose in 2015 when the Respondents claimed that the Appellant trespassed to their land. The instant

case is not fit for the principle of adverse possession to apply as there was no evidence that the Appellant had been in the occupation of the Respondents' land since 1987. The Respondents correspondingly stated that the dispute arose in 2015 as shown at page 36 of the proceedings. For this principle to apply, there must be a person occupying another person's land, denying the owner the right to reposes that land on account that the adverse possessor has been in that land for quite some time without interruption in the presence of the true owner. Adverse possession was defined by the Court of Appeal in the case of ***Registered Trustees of Holly Spirit Sisters Tanzania Vs. January Kamili Shayo and 136 Others***, Civil Appeal No. 193 of 2016 (unreported), the court stated;

> *"Adverse possession is occupation inconsistent with the title of the true owner, that is, inconsistent with and in denial of the right of the true owner of the premises."*

Regarding the instant appeal, the record shows that both the Appellant and the Respondents did not dispute the fact that the dispute arose in 2015. Before that time there was no dispute. The Appellant in her testimony stated that the dispute arose in 2015 when the first Respondent confronted her that the house was built on his plot. On the same vein, the first Respondent at page 36 stated that the dispute arose in 2015 when the invasion took place. In computing time, section 9(2) of the Law of Limitation Act provides that time starts to run when the dispute arises/ when the disposition took place. Since in the instant appeal the dispute arose in 2015, and the case was lodged in the same year, then the Appellant was within the 12 years limitation period prescribed for suits to recover land.

In a nutshell, the argument that the Respondents were time barred since the Appellant had been in possession over the suit land from 1987 is misguided since there is concurrence that the dispute arose in 2015.

Having said that, I now turn to the substance of the appeal. The scrutiny of all grounds of appeal reveal that the contest revolves around the evaluation of evidence by the trial Tribunal. What the Appellant challenges is that the Tribunal chairman erred in holding that the Appellant and his witnesses failed to prove the extent of the land alleged to be invaded by the Respondents. In her view, she substantiated in her evidence that the land in dispute is 12 by 25 footsteps.

I agree with the assertion made by the Appellant that the Tribunal chairman misconceived what was testified in the Tribunal. At page 15 of the proceedings, the Appellant in response to a question put by one of the Tribunal assessors replied in the following words:

> *"On West is my plot which is bounded with Rajab, the house made by trees and mud has no dispute, the dispute was on the house built by burn brick, if I had they land invaded into the* ***area of 12 by 25 footsteps****. The area in dispute was on* ***12 by 25 footsteps."***

As rightly submitted by the Appellant, this piece of evidence signifies that the Appellant did state the size and extent of the land she alleged to be trespassed by the Respondents, contrary to what the Tribunal chairman stated at page 5 of the typed judgment.

The other concern by the Appellant is that her evidence was strong than that of the Respondents hence she proved her case on the required standard. She contends further that she had uninterrupted enjoyment over the suit land from 1987 to the year 2015 and that the Tribunal was not legally justified to reach the conclusion it did as it is not supported by the facts and evidence on record.

The record of the trial reveal that other than oral evidence from both sides, parties submitted agreements to substantiate their claims. It is further evident that the contested piece of land was less than what was contained in the documentary evidence. Under the circumstances, it would have been prudent for the Tribunal to ensure that its decision was insusceptible of dispute. I have no doubts that the Tribunal analysed the evidence before it, but whether the analysis was fair and the decision reached is correct remains doubtful. The trial chairman did narrate the evidence of both parties in determining the two issues raised as can be seen at pages 2, 3, 4 and 5 of the typed judgment. He concluded that the Appellant and her witnesses failed to prove the case to the required standard.

Courts have repeatedly stated that the duty to evaluate evidence lies with the trial court, although a first appellate court may step into its shoes on fit cases. The Court of Appeal in ***Paulina Samson Ndawaya Vs. Theresia Thomas Madaha***, Civil Appeal No. 45 of 2017 (unreported), confirmed its earlier decision in ***Stanslaus Rugaba Kasusura & Another Vs. Phares Kabuye*** [1982] TLR 338, where it had held:

"It is the duty of the trial court to evaluate the evidence of each witness well as his credibility and make a finding on the contested facts in issue."

In ***Paulina Samson Ndawaya*** (supra), the Court added:

"In our view, since the burden of proof was on the Appellant rather than the respondent, unless and until the former had discharged hers, the credibility of the respondent was irrelevant. It is thus our firm view that the Appellant's criticism against the learned trial Judge is, with respect, without any justification and so ground No. 1 is held to be devoid of merit."

From the record, the justification given by the Tribunal for not accepting the Appellant's version was that she did not substantiate the size of her land. I have already said that this conclusion is not backed with the evidence. This conclusion leads this Court to conclude that the Chairman was not thorough in the way he evaluated the evidence before him. The record does not show whether the Tribunal visited the *locus in quo*. Considering the evidence before it, it was necessary that the *locus in quo* be visited. When the Respondent's case was closed, the Respondents hinted on the issue of visiting the *locus in quo*. There is also on record a letter from the Appellant to the Chairman of the Tribunal requesting that the disputed land be visited. There is no evidence that this was done. Failure to do so makes the decision of the trial Tribunal doubtful, more so because it hinges on the size of the piece of land said to have been trespassed. It should also be noted that the Respondents alleged that the Appellant had constructed a house in their plot. But the Respondents also testified that they were neighbours and used to keep their construction materials at the house of the Appellant. Further, the

suit was filed by the Appellant, not the Respondents. If it was true that the Appellant is the one who trespassed in their land, they would not have allowed her to start and finalise construction of a house and wait for her to complain at the Tribunal before they also alleged trespass. Failure to visit the *locus in quo* denied the Tribunal a chance to weigh the evidence before it. On the circumstances, I find that the third ground of appeal has merits.

A response to the third ground invariably caters for the other grounds of appeal as well. I have further examined the record of the trial Tribunal and it appears that the Chairman and the assessors concurred in their decision. There is no record that the opinions of the assessors were made known to the parties before the chairman crafted the judgment. This is a legal requirement. Presence of the opinion in the file does not exonerated the trial Court from the requirement that such opinion be made known to the parties prior to judgment. The Court of Appeal of Tanzania in the case of ***Edina Adam Kibona Vs. Absalom Swebe (Sheli),*** Civil Appeal No. 286 of 2017 (unreported), had the opportunity of explaining the requirements of Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, where it said:

> *"We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, it terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require everyone of them to give his opinion in writing. It may be in Kiswahili.* ***That opinion must be in the record and must be read to the parties before the judgment is composed****." (emphasis added).*

It was therefore incumbent upon the Chairman to ask the assessors to read their opinion before the parties. This was not done. Furthermore, the opinions on record do not substantiate why they disbelieved the Appellant's evidence.

In the circumstance, the appeal has merits. For the interest of justice, and considering the apparent errors committed by the trial Tribunal in relation to analysis of evidence, failure to visit the *locus in quo* and not reading the assessors' opinions to the parties, a retrial is the best recourse in this case. The Appeal is accordingly allowed. Parties are restored to the position they were in before the decision of the Trial Tribunal. Parties are at liberty to institute fresh proceedings before the Trial Tribunal which should be constituted by a different chairman and a new set of assessors.

Order accordingly.

Y. B. Masara
JUDGE
28th August, 2020