

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

LAND APPEAL NO. 28 OF 2019

**(Originating from the District Land and Housing Tribunal for
Iringa at Iringa in Application No. 50/2016 delivered by
Hon.Majengo Chairman).**

LINUS MNYAMOGA 1ST APPELLANT

WILLIAM MNYAMOGA 2ND APPELLANT

VUMILIA MNYAMOGA 3RD APPELLANT

VERSUS

**ANATALIA MNYAMOGA (As the Legal Person Representative of
Paulina Kilambo deceased) RESPONDENT**

18/9/ & 13/10/2020

JUDGMENT

MATOGOLO, J.

The respondent Anatalia Mnyamoga who is the administratrix of the Estate of the late Paulina Kilambo successfully sued the appellants namely Linus Mnyamagoha, William Mnyamagoha and Vumilia Mnyamagoha for

trespass to land 10 acres belonging to the Late Paulina Kilambo situated at Itamba village Mkwawa Ward within Iringa Municipality. The respondent filed a suit in the capacity as the Administratrix of the Estate of the Late Paulina Kilambo.

The appellants were aggrieved with the decision, they filed to this court a memorandum of appeal with three (3) grounds of appeal as follows:-

1. That the chairman misdirected himself by giving the judgment which is contradictory.
2. That the chairman erred in law and fact by failing to evaluate evidence given properly.
3. That the chairman erred in law and fact by failing to consider the law of limitation on the subject matter.

At the hearing of this appeal parties were represented, the appellants were represented by Ms. Rehema Daffi learned advocate, while the respondent was represented by Mr. Erick Nyato learned advocate.

This appeal was disposed of by way of written submissions.

Ms. Rehema Daffi submitted in respect of the first ground of appeal that, during the proceedings of the matter before the tribunal it was revealed that the first appellant was given a plot of land measured 0.5 acres and later on 1.5 acres were added which make it 2 acres.

She said, this was not disputed by both parties, however the chairman in his judgment declared that the first appellant was the owner of

2 acres out of 10 acres which belonged to the late Paulina Kilambo but he failed to show or state the boundaries / demarcation of the said land.

She argued that, this makes the decision of the tribunal to be uncertain and contradictory for purpose of execution.

Regarding the second ground of appeal, Rehema Daffi submitted that the trial chairman failed to analyze the evidence properly instead he stated about the evidence of one side and he delivered the judgment without giving clear reasoning for his decision but only that he said the evidence of the applicant was heavier than that of the respondents.

She contended that the testimony adduced by the applicant, respondent herein differ from one witness to the another like PW3 gave the testimony and told the tribunal that he does not know about the land which was testifying for.

She submitted further that there is contradiction on the death of the applicant's mother. In their application the appellants stated that the late Paulina Kilambo died in 2001 but the proceedings of primary Court and the letter for administration shows that she died on 24/08/2000. This makes the evidence adduced to be contradictory and inconsistency and the court has to be proved that the same is genuine. To that she cited the case of ***Salehe Versus R (1968) HCD NO. 391*** where the Court held:-

"Where the witness is proved to have a statement on oath inconsistency with a statement previously made by him, the credibility of that witness is completely destroyed unless he can give acceptable explanation"

She argued that the judgment given was not properly analyzed hence reached a wrong decision.

With regard to the third ground of appeal, she submitted that the respondent in her testimony stated that the 1st Appellant was given the land of two acres in 1988, however they claimed that after been given 2 acres later on the appellants started to use the whole land of 10 acres.

She submitted further that they further revealed that the late Paulina Kilambo passed away in 2001, but the matter was filed in 2016 after her demise.

That if you count the time from the time of death of the late Paulina Kilambo (The mother of the first Appellant) up to the time when the case was filed it is almost 16 years passed.

She contended that, the Law of Limitation Act under section 9(1) provides that the accrual of the cause of action commenced after the demise of the deceased. She cited the case of ***Yusuph Same and Another versus Hadija Yusuph (1996) TLR 347***.

That being the case it is her humble submission that the trial tribunal failed to consider that the matter was bad in law for being time barred.

Thus, she prayed to this court to quash the decision of the District Land and Housing Tribunal for Iringa and declare the Appellants the legal owners of the disputed land with cost.

In reply Mr. Nyato with regard to the first ground of appeal submitted that, the appellants in their submission alleged that the tribunal Chairman misdirected himself to deliver contradictory judgment basing on the ground

that he failed to show or state the boundaries or demarcation of the 2 acres which the 1st appellant was given out of ten acres.

It is the submission by the learned counsel that the issue of boundaries was not subject to the issues raised hence it was difficult for the trial tribunal to raise and determine an issue which both parties neither raised nor pleaded thereto. He submitted that the appellants are raising new issue in the submissions which they did not plead at the trial tribunal an act which amount to an afterthought.

He contended that, it is settled principle of law that matters not pleaded or taken in the trial court cannot be raised on appeal, to support his argument he cited the case of ***Hotel Travertine Limited and 2 Others vs. National Bank of Commerce Limited (2006) TLR 133***.

He went on submitting that the issue before the trial tribunal was, who is the lawful owner of the suit land and not boundaries. After all it was not the duty of the Tribunal to show or state the boundaries and that it was impossible for trial tribunal to frame any additional issue which either party in a case had no intention of making for himself, to that he cited the case of ***People's Bank of Zanzibar versus Suleman Haji Suleman (2000) TLR 347*** HC of Zanzibar at Vuga where it was held:-

“(ii) The Court should not have framed any additional issue so as to make for either party a case which he had no intention of making for himself”

Mr. Nyato was of the considered view that the decision of the trial Tribunal is certain and not contradictory and possible to execute.

With regard to the second ground of appeal, he submitted that the Chairman evaluated the evidence submitted by both parties properly that is why he delivered judgment in favour of the respondent. He contended that there is no contradictory or inconsistency on the part of evidence adduced by the respondent and his witnesses but inconsistency and contradiction is on the part of the appellants and his witness as it was substantiated in the trial tribunal judgment. He submitted that, it is upon evaluation of evidence that is why the trial tribunal found that the evidence of the respondent and her witnesses was heavier than that of the appellants. Since the parties to a suit cannot tie then the respondent emerged the winner. He submitted further that the trial chairman was guided by the principle of civil justice which suggests that a person whose evidence is heavier than of the other, is the one who must win the case.

To support his argument he cited the case of ***Hemed Said versus Mohamed Mbilu*** (1984) TLR 113.

With regard to the third ground of appeal he submitted that, according to the evidence of PW1 (the respondent) before the trial tribunal that it is the third year from the time appellants started to trespass on the disputed land, meaning from 2013 to 2016 when the suit was instituted before the tribunal is just three year elapsed.

He went on submitting that it was impossible for the respondent to institute legal proceedings counting the year from the date the deceased died as the appellants alleged because the appellants started to trespass into the disputed piece of land gradually in 2013 and intensively in 2016.

Hence the law of Limitation Act, cannot be applicable at this juncture and the cited authority is distinguishable to the scenario considering that the suit in the Tribunal was instituted within time.

Thus, He concluded by praying to this court to dismiss this appeal with costs.

In rejoinder Ms. Daffi reiterated what she stated in her submission in Chief and she added that, the issue of demarcation is not the new fact that was raised at appeal stage rather it was discussed at the trial tribunal but the chairman failed to state clearly which portion of land as he marked 2 acres out of ten is owned by the appellant.

With regard to the second ground of appeal, she submitted that if you read the respondent's application before the trial tribunal one can see that she stated that the dispute arose in 2009, she quoted the part of the application which read;

"Under paragraph 6 (a) (xii) he states that after demise of the applicants mother the applicant remained the only sole heir hence in 2009 decided to approach the 1st respondent to allow her and have a portion of land for ownership and cultivation but the 1st respondent denied any ownership to the applicant and claimed that he was the only lawful owner.

That in 2010 the applicant decided to refer the matter to the chairman of Itamba village and in 2012 to the chairman of Itamba Kitongoji/ sub

village for amicable resolution but without fruits and this year 2016 the 1st respondent has apportioned some plots to his children the 2nd and 3^d respondents and are building houses within the eight acres of the land”

She submitted that, they failed to understand and believe the truthfulness of the facts and evidence adduced before the trial tribunal. The respondent has been giving the statement and testimony which is contradicting by itself. In oral testimony during cross-examination the respondent stated that the appellant started to live there from long time ago, even after the death of her mother the appellant was still living there and all of his Children were born on the disputed place. She submitted that the respondent testified that even when she paid visit after the death of her mother the appellants stopped her. The respondent testified further that, the dispute started long time ago from 2005.

She was of the considered view that, the appellants were in possession of the disputed land even before the death of the respondent's mother.

She said looking at the testimony of PW2 it shows that the dispute started from 2010 and respondent's mother died in 2001. In 2010 the respondent went to claim at Itamba Chairman. And the appellants were in possession and used the land since 1990 even before the respondent's mother died. It was her submission that the trial tribunal failed to analyze

the evidence properly regardless of this contradictory facts hence reached a wrong decision.

She submitted further that since the respondent stated in her application that the dispute started since 2009 and some facts show that the dispute arose from 2010, it is not disputed and she insisted that this matter was out of time subject to the Law of Limitation Act and also subject to the doctrine of adverse possession.

And that the evidence adduced in court and pleadings filed at the trial tribunal contradict themselves as they have explained in their submission in chief. There is no doubt that the prosecution witnesses contradicted themselves some saying they have always seen the appellant living in the said land and the respondent on one part saying the appellant was not using the land while on examination in chief but during cross examination she changes her story. She concluded by insisting this court to allow this appeal.

Having read the respective submissions by the parties and having carefully gone through the grounds of appeal and the court records, the main issue to be determined here is whether this appeal has merit.

With regard to the first ground of appeal, the appellants' complaint is that, the chairman misdirected himself by giving judgment which is contradictory. There is clear evidence that the 1st appellant in 1988 was invited by the applicant and her mother (The late Paulina Kilambo) and he was given 0.5 acre which is found within 10 acres of the land for construction of his house. Later on he was shown 1.5 acres by the late Paulina Kilambo for cultivation

It is my considered opinion that, there was no need for the trial Chairman to state boundaries of the disputed land, as the evidence in the court record speak loud that the 1st appellant was allocated 2 acres out of ten acres. So the 2 acres belonging to the 1st appellant are well known. Thus there is no any contradiction in the trial Tribunal judgment as alleged. The first ground of appeal is baseless.

With regard to the second ground, the main complaint by the appellants is that the chairman erred in law and fact by failing to evaluate the evidence given properly.

I have carefully read the trial tribunal judgment, it is not true as alleged by the appellants' counsel that, the trial chairman failed to evaluate the evidence properly. As seen at page 3 to 4 of the typed judgment, the trial Chairman evaluated and considered evidence of both sides and came up with the finding that the evidence of the respondent was heavier than that of the appellants. It is trite law that a person whose evidence is heavier than the other must win the case, see ***Hemed Said versus Mohamed Mbilu (supra)***.

The appellants also complained that, there is contradiction on the date of the death of Paulina Kilambo(the respondent mother), as in her application she stated that the late Paulina Kilambo died in 2001 but the proceedings of the primary court and the letter of administration shows that she died on 24/08/2000.I have noted that variation on the dates, but the said letter of administration was tendered in trial the tribunal as evidence and it was admitted as exhibit P1, the same when being tendered was not objected by the appellants nor did they cross-examine the

respondent on the difference of date of death of the respondent's mother. Failure to cross-examine the witness on that issue at trial Tribunal, implies that the appellant accepted to what contained in the letters of administration and accepted to all what the respondent testified, raising this issue at this stage is an afterthought.

Regarding the third ground of appeal, the Appellants complaint is that the trial Chairman erred in law and fact by failing to consider the law of Limitation on the subject matter. Ms. Daffi submitted that, the respondent in her evidence testified that, the 1st Appellant was given the land, 2 acres in 1988, however they claimed that after the 1st appellant was given those 2 acres of land, the appellants started to use the whole land of 10 acres. She contended that, the late Paulina Kilambo passed away in 2001, but the matter was filed in 2016 after her demise (almost 16 years has passed). She cited section **9(1) of the Law of Limitation Act (supra)** which provides that;

"The accrual of the cause of Action commenced after demise of the deceased"

Although there is evidence from the court record which reveals that, the late Paulina Kilambo passed away in 2001 per exhibit P.1 deceased death certificate, and according to PW.1 the dispute started from 2005, but the serious dispute arose in 2010. According to PW1 when she approached the 1st appellant to give her the land for ownership and cultivation, the 1st appellant denied any ownership to the respondent, it is when the dispute arose, she complained against him at the village chairman for mediation

but the latter failed to mediate. However, and importantly the 1st appellant was a mere invitee on the suit land who cannot be protected by the limitation period as it was held in the case of ***Swalehe versus Salim(1972) HDC 140*** it was held that;

“No invitee can exclude his host whatever the length of his occupancy”.

See also the case of ***Samson Mwambene v. Edson James Mwanyingili [2001] TLR. 1***

Even though the 1st appellant as argued by his counsel he started to use the disputed land even before the death of the respondent’s mother, in my view continuous use of the land as an invitee or allowing his children (2nd appellant and 3rd appellant) building permanent house on another’s land would not amount to assumption of ownership of the disputed plot of the land by the Appellants, see also the case of ***Maigu Magenda versus Arbogast Maugo Magenda***, Civil Appeal No. 218 of 2017 (unreported) CAT at Mwanza.

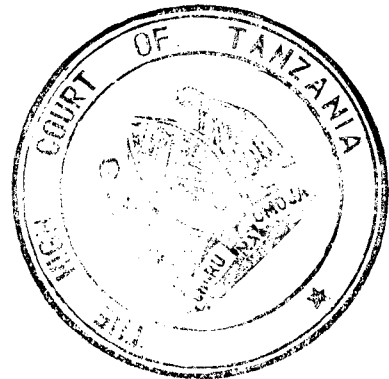
But also at that time when the dispute arose the respondent has no locus standi as she was not appointed as an administratrix of the estate of her late mother (Paulina Kilambo), she obtained the letters of administration on 6th day of June 2016.


Under such circumstances, in no way appellants can be protected by the doctrine of adverse possession. A claim for adverse possession cannot succeed if the person asserting the claim is in possession of the land with the permission of the owner. See also the case of ***Waweru versus Richu (2007) 1 E.A 403***

For the foregoing reasons this ground has no merit and this appeal fails, the same is dismissed with costs.

DATED at **IRINGA** this 13th day of October, 2020.


F.N. MATOGOLO
JUDGE
13/10/2020.



Date: 13/10/2020
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
1st Appellant: 
2nd Appellant: Present
3rd Appellant: Present
Respondents: Present
C/C: Grace

Mr. Mpeli Mwakambungu - Advocate:

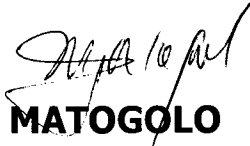
My Lord I am holding brief for Ms. Rehema Daffy advocate for the applicants.

Mr. Erick Nyato - Advocate:

My Lord I am appearing for the Respondent. The matter is for judgment we are ready.

COURT:

Ruling delivered.


F.N. MATOGOLO
JUDGE
13/10/2020.

