

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

LAND APPEAL NO. 15 OF 2019

(Arising from Land Application Case No. 26 of 2018 at the District Land and Housing Tribunal for Nzega at Nzega)

IBRAHIM KITABITA APPELLANT

VERSUS

ANTHON NDEKO & 7 RESPONDENT

JUDGMENT

KIHWELO, J.

The decision in this matter was reserved by my late brother, Bongole, J, who suddenly fell ill and died on the night of 15th July 2020. The record has now been re-assigned to me.

The appellant above named being aggrieved by the decision of the District Land and Housing Tribunal (Henceforth “the Tribunal”) for Nzega in Land Application No. 26 of 2018 has lodged the instant appeal before this Court. The background to this appeal is briefly that, the appellant filed an application against the respondents before the Tribunal claiming that the suit land was the property of the late Mashimi Ndeko Ngasa (the applicant’s grandfather) who temporarily allocated the suit land to his young brother one Malambo Ndeko on condition that he would use that suit land until when

he acquires his own land but unfortunately since 1980 when Malambo Ndeko vacated the suit land his descendants the respondents herein have illegally occupied the suit land and have persistently denied to give vacant possession. The appellant therefore prayed before the Tribunal that the respondents demolish all their structures on the suit land and that they vacate and hand over the suit land to the appellant. The respondents on their part strongly resisted the application by denying all the allegations and maintained that the suit land was not part of the estate of the late Mashimi Ndeko Ngasa. The respondents went on to claim that they were all born and raised within the suit land and that they built their houses and they have resided at the suit land during their entire life.

In the ensuing case for the appellant, four (4) witnesses were lined up in support of the claim. On their part, the respondents featured ten (10) witnesses to support the denial of the appellant's claim.

At the height of the trial, the Tribunal proceeded to declare the respondents as lawful owners of the disputed land on account of the doctrine of adverse possession. In the result, the application filed by the appellant was dismissed but since parties are relatives the Tribunal did not give any order as to costs and each part had to bear own costs. The appellant is dissatisfied, hence this appeal which is grounded upon two (2) points of grievance namely:

1. *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law and fact in considering the doctrine of adverse possession which is not applicable in the case at hand.*

2. *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law and fact in his failure to consider the applicant's evidence which was very necessary in the case at hand.*

Before this Court Mr. Thadeus Fredrick Kivulunzi, learned counsel appeared for the appellant while the respondents were represented by Mr. Samwel L. Ndaga, learned counsel. Both learned counsels had lodged written submissions either in support or in opposition of the appeal.

It is necessary to revisit, albeit briefly the evidence adduced during the trial. The case for the appellant was to the effect that Ibrahim Kitabita (PW1) is the administrator of the estate of the late Mashimi Ndeko Ngasa who died in 1984 and that the suit land was the property of the late Mashimi Ndeko Ngasa who invited his young brother Malambo Ndeko to the suit land on condition that the later would use the said land until when he acquired his own land. In 1973 Malambo Ndeko acquired a piece of land at Nzima area, Izibaziba Ward in Nzega District but before relocation Operation Villagization ensued and he had to move back to the village where he was allocated a piece of land by the Village Council. Sometimes in the year 1980 Malambo Ndeko moved back to the land which he was previously allocated by his brother Mashimi Ndeko Ngasa but his brother was not pleased and therefore he advised Malambo Ndeko to go back to Nzima where he had acquired land and Malambo Ndeko moved to Nzima accompanied with his two children Kasheto Malambo and Tuli Malambo. PW1 complained that since then the respondents herein who are grandsons and great grandsons of Malambo Ndeko have resisted to

vacate the suit land and that an attempt to evict them was done in 2015 during the first family meeting but did not succeed.

According to Julius Mashimi Ndeko (PW2) who is the son of the late Mashimi Ndeko Ngasa his father acquired the suit land in 1920 by clearing the bush and started cultivation and that after the second world war his uncle Malambo Ndeko asked his father to use that land temporarily while looking for his own land. He went on to testify that sometimes in 1984 his uncle relocated to Nzima but left behind his wife and some of his children. According to PW2 what prompted the filing of the land application before the Tribunal was the misunderstanding and endless grudges between the two families that is the appellant's and the respondent's families but otherwise they had no intention of evicting the respondents from the suit land. He testified further that their family meeting resolved that the respondents were only allowed to use the suit land but not to dispose it. The testimonial account of Amina Hajj (PW3) is more or less the same as that of PW1 and PW2 but her testimony was fairly brief and she gave an account of how the suit land was allocated by Mashimbi Ndeko to Malembo Ndeko but admittedly testified that she was just informed as she was still a young girl when the land was allocated. Finally, Alfred Nshimbi (PW4) testified that he was a neighbor to Mashimi Ndeko and Malambo Ndeko and that the land was allocated to Malambo Ndeko in 1965 and that later when Malambo Ndeko got a land at Nzima he moved and handed over the land in dispute to Mashimi Ndeko. Upon cross examination he testified that the land in dispute was allocated in 1950 and since he was born in 1950 he was told the story by his grandfather. He went further to testify that when Malambo Ndeko moved

to Nzima he left with all his children and his wife and that Mashimi Ndeko died in 1986. I must make remark in passing that going through the testimony of PW4 two things comes into my mind and that is either PW4 is not a truthful witness or the testimony of PW4 is contradictory more in particular when compared to the testimony of PW1, PW2 and PW3.

In reply, the respondents unveiled a somewhat unison tale. All the respondents, it was told, are descendants of Malambo Ndeko the previous occupier and owner of the suit land now deceased. Their joint account was that they were legitimate owners of the land in dispute having inherited from their grandfather and for some their great grandfather the late Malambo Ndeko who occupied the suit land for a couple of decades. They testified that the suit land belongs to their family and not the appellant's family since they were all born, raised and lives in the suit land which they depend for their livelihood. According to the respondents, they have been occupying the suit land peacefully without interruption ever since until recently.

This detail is fortified by the testimony of Matheo Njamba (DW8) a 76 years old neighbor who testified to know very well the parties and the boundaries of the suit land and that the two brothers Mashimi Ndeko and Malambo Ndeko each occupied a separate piece of land which were in the Eastern and Western part respectively. The same account was testified by Swaga Zakaria (DW9) and Paschal Maganga (DW10) who both testified in support of the respondents' claim.

Therefore, in a nutshell, the respondents counter claimed ownership of the suit land and justified their occupation with the claim that the suit land was inherited from their grandfather and great grandfather who legally occupied the suit land before he died.

In support of the appeal, the appellant first of all opted to abandon the second ground of appeal and merely argued the first ground only. The appellant faulted the decision of the Tribunal on a number of fronts but specifically the appellant challenged the Tribunal's finding that the respondents acquired ownership of the suit land under the doctrine of adverse possession. He traversed the evidence of the appellant's witnesses who indicated that Mashimi Ndeko Ngasa family obtained the suit land in the year 1920 and that the respondents' grandparents and great grandparents was allocated the suit land sometimes after the second world war and that in 1984 the respondents' grandparent and great grandparent relocated to Nzima along with some of his family members. He forcefully argued that the issue of time limit as per item 22 of the Law of Limitation Act, Cap 89 R.E 2002 and the doctrine of adverse possession does not apply. He cited the provisions of section 33(1) and section 18(1) and (2) of the Law of Limitation Act to support his argument. He went on to submit that possession and occupation of land for a considerable period of time do not in themselves automatically give rise to a claim of adverse possession. In buttressing further, this point he cited the celebrated case of **Registered Trustees of Holy Spirit Sisters of Tanzania v January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016 in which this principle was enunciated by the Court of Appeal while taking inspiration from the Kenyan case of **Mbiru v Gachuhi**

Date : 17/12/2020

Coram : Hon. B.R. Nyaki, DR

Appellant : Present in person

Respondent: Present 1st and 2nd the rest absent

Bench Clerk: Grace Mkemwa, RMA

Court: Judgment delivered this 17th day of December, 2020 in the presence of the Appellant and 1st and 2nd Respondents but in absence of the 3rd, 4th, 5th, 6th, 7th and 8th Respondents.

Right of appeal explained fully i.e before Court of Appeal of Tanzania within 60 days.



B.R. Nyaki
DEPUTY REGISTRAR
HIGH COURT – TABORA

