

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT TABORA**

**MISCELLANEOUS LAND APPEAL CASE NO. 13 OF 2019**

*(Arising from Land Appeal No. 03 of 2019 at the District Land and Housing Tribunal for Nzega at Nzega and Original Land Application No.86 & 299 of 2018 at Bukene Ward Tribunal)*

**KHADIJA ALLY GOMBANILA ..... APPELLANT**

***VERSUS***

**SHUKURU SALASINI ..... RESPONDENT**

**JUDGMENT**

**KIHWELO, J.**

The judgment in this matter was reserved by my late brother, Bongole, J, who suddenly died on the night of 15<sup>th</sup> July 2020. The record has now been re-assigned to me.

The appellant herein KHADIJA ALLY GOMBANILA has come before this Court challenging the decision of the District Land and Housing Tribunal (Henceforth “the Appellate Tribunal”) for Nzega in Land Case Appeal No. 03 of 2019 dated 25<sup>th</sup> September 2019 which upheld the decision of the Bukene Ward Tribunal (Henceforth “the Ward Tribunal”). In support of the appeal, the appellant filed a four (4) ground petition of appeal which essentially boils down to challenging the evidence that was

believed by the trial Tribunal to warrant declaring the respondent the lawful owner of the land in dispute.

The background to this appeal is briefly that the appellant filed a land dispute before the Bukene Ward Tribunal against the respondent in which according to records the complaint before the Ward Tribunal was trespass to land. In the ensuing case for the appellant, one witness was lined up in support of the claim. On his part, the respondent featured a number of witnesses to support the denial of the appellant's claim.

At the height of the trial, the Ward Tribunal proceeded to declare the respondent as lawful owner of the disputed land. In the result, the application filed by the appellant was dismissed. Dissatisfied by the decision of the Ward Tribunal the appellant filed an appeal before the Appellate Tribunal of Nzega in Land Case Appeal No. 3 of 2019 which upon carefully listening the parties the appellate tribunal upheld the decision of the Ward Tribunal and dismissed the appeal. As the appellant was not pleased with that decision of the appellate tribunal she came before this Court hence the instant appeal.

With consent of the parties the appeal was disposed by way of written submissions either in support or in opposition of the appeal.

In support of the first ground of appeal the appellant valiantly argued that the appellate tribunal completely failed to give reasons why it agreed with the findings of the Ward Tribunal and therefore making the decision erroneous and a nullity for being unfair. To bolster her argument, she cited the case of **Kasusura V Kabuye** [1982] TLR 338. She went on to submit

that the records of the Ward Tribunal which was upheld by the appellate Tribunal clearly indicates that the decision was based upon number of witnesses who were around during the visit of the *locus in quo* and not the quality of the evidence. She insistently argued that the Ward Tribunal did not consider the evidence of the appellant's neighbors Mashaka Kiyabo and Salehe Juma as well as the evidence of Tatu Shaban and Shida Shaban and therefore it is not true that only one witness testified on the part of the appellant.

In support of the second and third grounds of appeal the appellant strenuously argued that the appellate Tribunal did not consider and appreciate the fact that the appellant used the land in dispute for an interrupted period of 40 years from 1978 to 2018 and that it was surprising that this issue was not dealt with at all by both the trial Tribunal as well as the appellate Tribunal. She reiterated that this was contrary to law in as far as limitation of actions is concerned and that had this matter been considered the position would have been different. To back this argument, she cited the case of **Shaban Nassoro v Rajab Simba** [1967] HCD 233.

Amplifying on the fourth ground of appeal the appellant submitted that although there were two complaints before the Ward Tribunal No. 86 and No. 299 in relation to trespass to land and presumably false imprisonment (*kumzuia mtu kwa nguvu*) only the trespass issue was determined leaving the other one undetermined. She challenged the approach taken by the appellate Tribunal using the principle of overriding objective.

In response the respondent supported the impugned decision of the appellate Tribunal on account that it was rightly made and that the conclusion arrived at was appropriate in the circumstances of the instant case.

He lucidly began by submitting in response to the argument that the appellate Tribunal decided the matter in favour of the respondent in the absence of evidence that met the test of the law, and that in his opinion the respondent had strong case than the appellant who produced only one witness during the hearing of the application before the trial Tribunal and that the assertion that the evidence of SHIDA SHABAAN and TATU SHAABAN did not appear on record and that their testimony is not considered is unfounded because as a matter of fact and law the appellate court normally deals with records of the trial court and not otherwise. He forcefully argued that there was no proof at all indicating that the said witnesses or any documentary exhibits were produced as alleged by the appellant and that this was the reason why the appellate Tribunal did not give weight to the appeal by the appellant. He further argued that the Chairman of the appellate Tribunal gave reasons as to why he came to the conclusions he arrived at. He went on to cite the case of **Yusuph Kalabwe v Barahunga Athuman**, Miscellaneous Land Appeal No. 25 of 2012 High Court of Tanzania (Land Division) (unreported) which was cited by the Honourable Chairman in his judgment.

In response to the issue of adverse possession the respondent submitted that this was a misconception on the part of the appellant since it was the respondent who was in occupation of the suit land and that is why the appellant filed an application before the trial Tribunal seeking to

evict the respondent from the suit land and that the appellant's claim that she has been in possession of the suit land for 40 years is baseless since the respondent has been in occupation of the suit land peacefully and uninterruptedly from the independence period to date. The respondent strongly argued that the doctrine of adverse possession does not apply at all to the instant matter.

In response to the third ground of appeal the respondent was fairly brief, he submitted that the appellant miserably failed to prove that the appellant's husband was in possession of the suit land for 40 years and that evidence given by Kulwa Ngassa and Salehe Rashid during the visit of the *locus in quo* by the ward tribunal proved that the respondent was the owner of the suit land and that the claim by the appellant was baseless. He further submitted that the assessors of the trial Tribunal gave their opinion according to the evidence on record in line with what they heard from the witnesses when they visited the *locus in quo*.

In reply to the fourth ground of appeal which related to the allegations that the trial Tribunal mixed records by failing to act upon the case instituted by the appellant and instead acted upon the land case instituted by the respondent, the respondent was once again fairly brief, he submitted that there was no proof that the respondent instituted any suit against the appellant. He valiantly argued that Land Case No. 86 and Land case No. 299 if at all they were instituted by the appellant against the respondent he (the respondent) was not aware about them and no summons was served upon the respondent and that the only case that the respondent was aware was Land Case No. 6 of 2018 which originated from Bukene Ward Tribunal whose appeal went to Nzega District Land and

Housing Tribunal as Land Case Appeal No. 6 of 2019 and that there is no record for the Case No. 86 and 299.

The respondent further argued that the trial Tribunal followed the proper procedures for reaching the final decision after consideration of the available evidence on record and that the argument that the respondent is not an administrator of the Estate of his late father does not hold any water at all since the respondent who was sued by the appellant has right to defend the property of his later father. He finally, submitted that even if the judgment was not properly arranged but it had all the ingredients of a judgment and that mere legal technicalities should not hinder substantive justice. To back this argument, he referred to the case of **General Marketing Co. Ltd v A.A Shariff** [1980] TLR 61 where the Court religiously held that rules of procedure are handmaids of justice and should not be used to defeat justice.

In rejoinder submission, the appellant was a bit lengthy. In particular, she submitted that the appellant was the rightful owner of the suit land since 1978 to date and that it was in 2018 when the instant dispute arose. She went on to insistently submit that there was two disputes Land Case No. 86 and Land Case No. 299 which related to the same parties and the same subject matter of the dispute and whose decision led to miscarriage of justice on the part of the appellant. The rest of the submission was somehow a repetition of the submission in chief.

Going by the written submissions filed in this court by the parties and upon close scrutiny of the records of both the trial Tribunal as well as the appellate Tribunal, there seems to be one issue that cries for my

determination and that is whether or not the appeal before this court has any merit.

Admittedly, long use of a landed property or technically referred to as adverse possession, is one of the legal ways of acquisition of interest on land. However, I wish to state that the Court of Appeal of Tanzania has held from time to time that, long possession of land does not automatically give title to the adverse possessor. See **Attorney General v Mahezi Mohamed (As administrator of the late Dolly Maria Eustace) and Others**, Civil Appeal No. 311 of 2019. Furthermore, the Court of Appeal has in a number of occasions held that adverse possession is a shield and not a sword. In the case of **Origenes Kashoro Uiso v Jacquelin Chiza Ndirachuza**, Civil Appeal No. 259 of 2017 the Court religiously held thus,

*"No declaration can be sought on the basis of adverse possession in as much as adverse possession can be used as a shield and not as a sword. The appellant cannot rely on the principle of adverse possession in a case which he is a plaintiff."*

That said, I am of the considered opinion that the appellant wrongly invoked the principle of adverse possession and therefore the trial Tribunal as well as the appellate Tribunal rightly found out that the appellant claim was baseless.

It is a cardinal principle of law that he who alleges a fact has the duty to prove it (see **Lamshore Limited and J.S. Kinyanjui v Bazanje K.U.D.K** [1999] TLR 330) and section 111 of the Tanzania Evidence Act, Cap 67 R.E 2002. I am also alive to the principle of law that parties to a



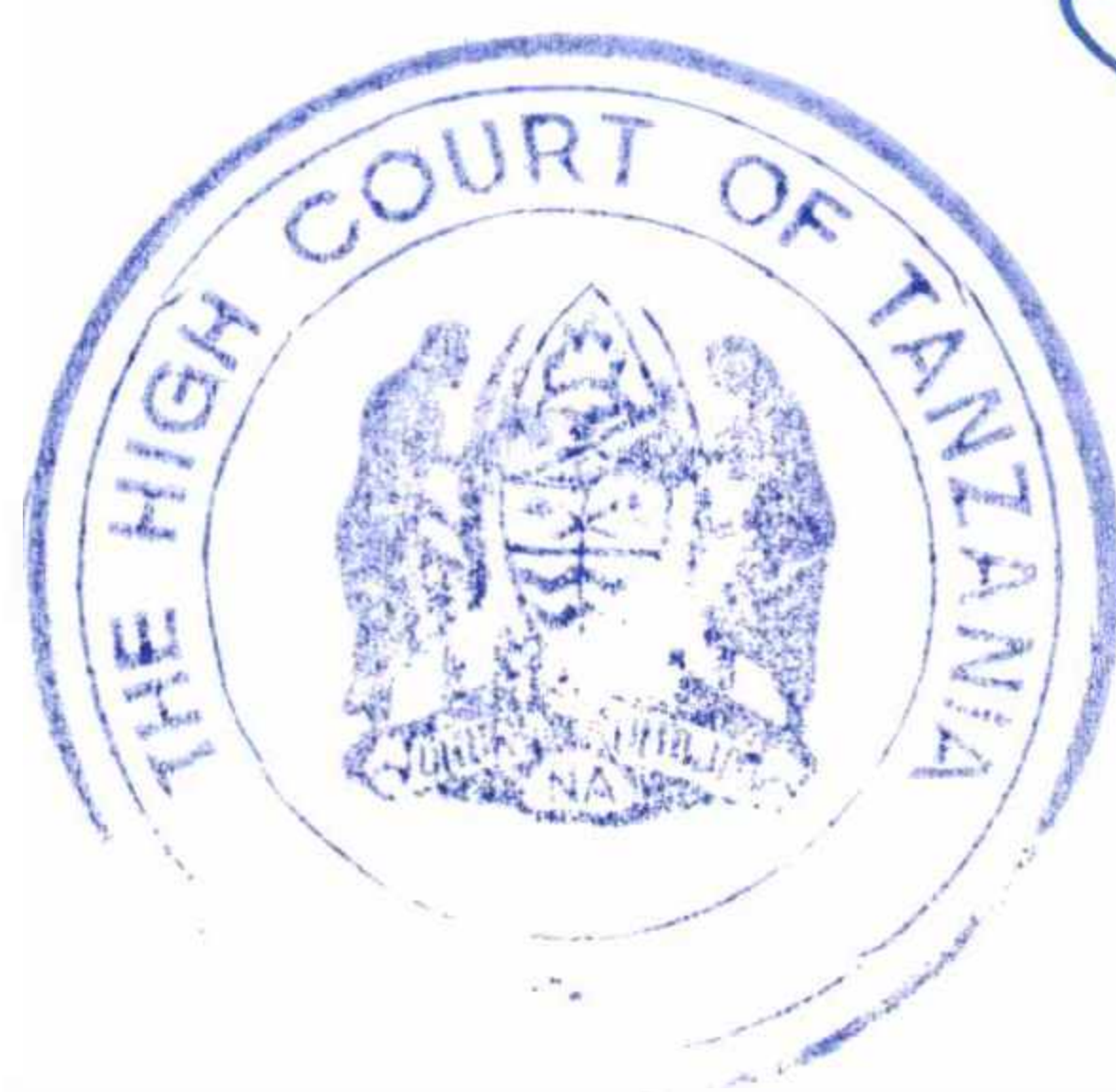
case cannot tie. In the case of **Hemed Said v Mohamed Mbilu** [1984] TLR 114 the court decisively held that;

*"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

The appellate Tribunal took a view permissible in my mind because it was not proved to the satisfaction of the trial Tribunal that the appellant was the owner of the suit land and in the contrary, the respondent is the one who was able to establish through a string of witnesses who appeared and supported the respondent's claim. In short, on my evaluation of the evidence on record I find that the evidence adduced by the respondent was a lot weightier than that the appellant. The decision of the trial Tribunal and that of the appellate Tribunal were thus justified in law.

In the upshot and for the reasons stated above I find the present appeal has no merit as a result the appeal is hereby dismissed with own costs.

Order accordingly.



**P. F. KIHWELO**

**JUDGE**

**10/12/2020**



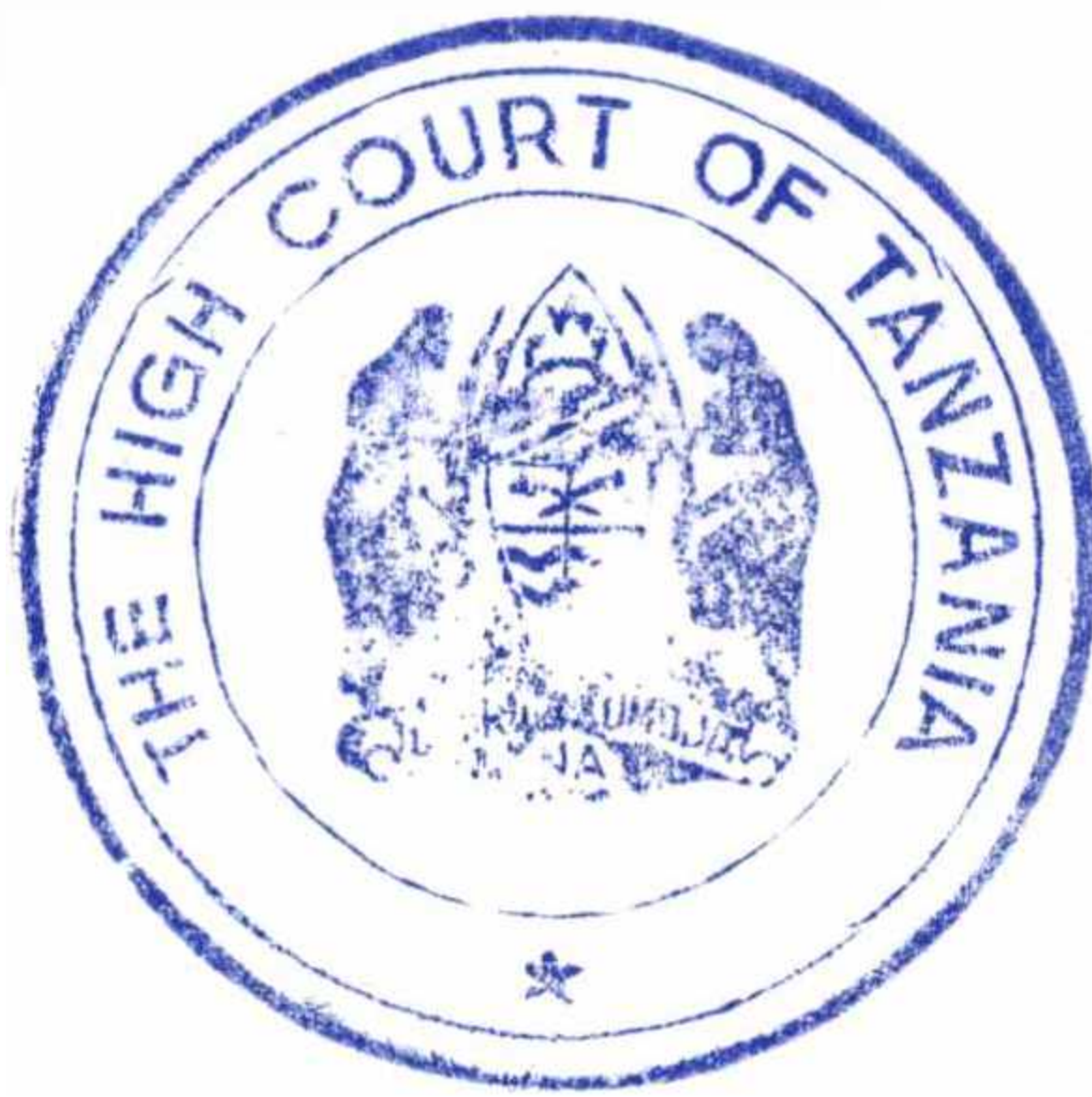
Judgment to be delivered by the Deputy Registrar on a date to be fixed.



**P. F. KIHWELO**

**JUDGE**

**10/12/2020**



**Date : 17/12/2020**

**Coram : Hon. B.R. Nyaki, DR**

**Plaintiff : Present in person**

**Defendants: Mr. Frank Kavishe, Advocate Holding Brief for  
Mr. Dotto Kulaba**

**Bench Clerk: Grace Mkemwa, RMA**

**Court:** Judgement delivered this 17<sup>th</sup> day of December, 2020 in the presence of Mr. Frank Kavishe, Advocate holding brief of Mr. Dotto Kulaba for the Appellant and Respondent in person.

Right of appeal explained fully.



A handwritten signature in blue ink, appearing to read "B.R. Nyaki".

B.R. Nyaki  
**DEPUTY REGISTRAR  
HIGH COURT – TABORA**