IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

LAND APPEAL NO. 25 OF 2020

(Originating from the District Land and Housing Tribunal for Moshi at Moshi Application No. 109 of 2017)

JULIUS .L. LYIMO ---------- APPELLANT

VERSUS

DAINES .A. KAWICHE ---------- 1ST RESPONDENT
RAPHAEL .M. MATERU ---------- 2ND RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant herein has raised the following grounds of appeal: -

(1) That, the District Land and Housing Tribunal grossly erred in law and fact for failure to evaluate properly the evidence before it as a result reached at an erroneous decision.

(2) That, the District Land and Housing Tribunal grossly erred in law and fact for concluding that the

respondents are legal owners when their evidence is flimsy and contradictory with their witnesses.

(3) That, the judgment is bad in law for lack of legal reasoning.

The appellant has decided to come through the window of appeal having being dissatisfied with the whole decision of the District Land and Housing Tribunal Moshi at Moshi where the appellant had filed Application No. 109 of 2017 and lost the case. At the hearing of the appeal, the same was ordered to proceed by way of written submissions.

Mr. Joseph Masanja advocate representing the appellant submitted that, in civil jurisprudence all that matters is not the number of witnesses but which evidence is heavier than the other. The same should be gauged on a balance of probabilities. To support his stance, the learned counsel cited the case of **Hemed Saidi vs. Mohamed Mbilu [1984] TLR, 113**. On the same footing the learned counsel was of the opinion that, had the trial tribunal evaluated the evidence properly would have found in favour of the appellant.

As far as, the evidence of the respondents' is concerned, it was submitted that, the first respondent herein (Daines

Kawishe) did not even know the boundaries of the suit land which she allegedly bought. Further the then first respondent reflected to have been the legal owner was a mere tenant. In view thereof the respondent's testimonies were contradictory.

Lastly the appellant's advocate contended that, the trial tribunal did evaluate the evidence, recorded well the legal issues and answered them, but did not record the opinion of the assessors and the reasons of differing with them.

The appellant's counsel ended by praying to the court to quash and set aside the tribunal's decision and its corresponding decree.

In response thereto, the respondents who were unrepresented submitted, there was sufficient evidence to prove that the first respondent herein Daines Kawishe was the legal owner of the suit land. It is apparent on record that one Anthony Ndesyemeke on 20th July, 2002 had publicly announced of his intention to sale the suit land. As a result on 25th September, 2002, he sold the same to one Michael Temu (Mako John Temu) at a tune of Tshs. 520,000/=. The said Michael Temu on 19/11/2002 sold the same to the first

respondent herein (Daines Jacob Kawishe) at a consideration of Tshs. 400,000/= (Exhibit D1). The said Daines Kawishe utilized the suit land up to 2017 when the appellant raised claims of ownership of the suit land.

Be as it may, counting from the year 2002 to 2017, (15 years) is more than 12 statutory years given in land matters for one to come claiming for ownership as provided for under part I item 22 of the schedule to the **law of Limitation Act Cap 89 R.E. 2019.**

Further the respondents wondered why the appellant did not sue one Anthony Ndesyemeke Mosha (Ngurumo) who had leased the suit land and his late father. This is in accordance to his testimony that Anthony Mosha (Ngurumo) was the one in possession of the land on allegation that he had been leased the same by the appellant's late father.

As regards the alleged contradictory evidence, to be specific that of the 1st respondent, the respondents elaborated that it is not possible for such an old lady to remember everything. Even though the same did not occasion injustice on the appellant. In support thereof, the

respondents referred the court to **Section 45 of the Land Disputes Courts Acts, Cap 216 R.E. 2019**.

In the event the court finds there was an irregularity should employ the recently introduced principle of overriding objective provided for under the written laws (Miscellaneous Amendment Act No. 8/2018) and as was observed in the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph, Civil Appeal No. 55/2017, CAT (Mwanza – unreported)**.

As far as the issue of the trial tribunal's judgment is concerned, the same lacks merits. The respondents buttressing on this point, submitted the trial tribunal had complied with all the principles governing production and analyzation of evidence. Further there was sufficient evidence from the respondent's side.

In the upshot, the respondents prayed the appeal be dismissed with costs.

In rejoinder, the appellant's counsel submitted that, the referred to Exhibit "D1" was not tendered in court, as proof of Daines Jacob Kawishe's ownership of the suit land.

Further, the principle of adverse possession cannot hold water in this matter since the appellant was unaware of the trespass and once it came to his knowledge, he immediately took action.

It is imperative before going to the merits of the appeal to state the historical background of the dispute. It is in evidence that, the appellant alleged he came into possession of the suit land estimated about two acres at Kilacha Himo by virtue of inheriting the land from his late father one Lazaro Kifai Lyimo. His father had left the farm in the hands of a care taker one Anthony Ngurumo and when his father died, the appellant communicated with the care taker who had entered into an agreement with his late farther to the effect that, he was to cultivate the said farm on condition that upon harvesting crops therein, would give 10% of the crops to the late father. It was after the death of the said care taker while visiting the suit land, he found trespasser's on the land who alleged they had been allowed to utilize the suit land by the owner. The appellant marshaled three witnesses PW2, George Mosha, PW3, Peter Mawina and PW4, Christian Lyimo who collaborated the appellant's evidence that, indeed the land belonged to the late Lazaro

Kifai Lyimo who cleared the land in 1975 and leased out the same to Anthony Ngurumo.

On the other side the then respondents had a different version of the story. Mr. Anold Shirima (the then first respondent) clearly announced that he was merely a tenant and not the owner. In his understanding there was a sale of land that belonged to the late Michael Temu who sold an acre to Daines Kawishe (the then second respondent) for a consideration of Tshs. 400,000/= which transaction was officially witnessed by the area leaders. Michael Temu proceeded to lease out the remaining acre to him on the condition that, he would pay ten percent of the proceeds after harvesting. Fate had it that on 28/6/2006 the late Michael Temu and his wife died in an accident. At the burial it was agreed and the relatives allowed him to proceed utilizing the suit land for the benefit of the deceased's children.

In 2017 he was surprised to find the appellant trespassing on the suit land. In a nutshell the suit land belonged to Michael Temu and Daines Kawishe. His witnesses DW3 and DW4 explained of how in 1977 the land came into the possession

of one Anthony Michael Ngurumo who sold the land to one Michael Temu and Michael Temu sold the same to Daines Kawishe. The then second respondent Daines Kawishe testified the one acre she owns was sold to her in 2002 by the then owner, Michael Temu and she had utilized the same for over 15 years.

Then then third respondent Raphael Temu apparently the late Michael's son and administrator claimed, one out of the two acres was the property of his father which he bought from Anthony Mosha Ngurumo for a consideration of Tshs. 520,000/= on 25/9/2002 exhibited by Exhibit "D2", "D3" and "D4". Sometime later his late father sold one acre to Daines Kawishe (the then second respondent) and leased out one acre to Anold Shirima (the then first respondent). His witness DW6 collaborated the evidence of the respondents' side that, Daines Kawishe purchased one acre from Raphael Temu's late father. Prior to that, Raphael Temu's late father had purchased the suit land from one Anthony Mosha Ngurumo.

Coming to the grounds of appeal, I will generally deliberate upon the grounds of appeal raised. It would seem the

appellant who has now appealed against the original second respondent and third respondent was dissatisfied, on how the trial tribunal had evaluated the evidence adduced. The trial chairman had made the following observations at page 5 of the judgment;

"The applicant and his three witnesses he did call during the trial it appears clearly that, he had no any good title to prove the acre of land after purchasing it from the 5th witness's father or Michael Temu."

Having painstakingly gone through the evidence, it is obvious that the appellant did not prove with sufficient evidence how his father came into possession of the suit land. He simply narrated the suit land (about 2 acres) belonged to his late father one Lazaro Kifai Lyimo but did not substantiate the same. His witnesses had no sufficient evidence to prove that the land did belong to the late Lazaro Kifai Lyimo. Neither was there evidence to show that the alleged care taker or who had leased the suit land (the late Anthony Ngurumo) had actually been leased the same. To the contrary the respondent's case was much heavier than that of the appellant and on a balance of probabilities considering the

witness testimonies and the corresponding exhibits, the appellant's case was bound to fail. The appellant had a legal duty to prove that which he alleges. The **Evidence Act, Cap 6 R.E. 2019** is loud and clear that: -

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists."*

It is not that, the trial tribunal relied solely on the evidence of the first respondent herein but it considered the evidence as a whole which was overwhelming that, the first respondent herein had legally bought the suit land from the previous legal owner.

The appellant seems to fault the judgment itself. In his written submissions, he admits that, the trial tribunal did evaluate the evidence, recorded well the legal issues and answered them but did not record the opinions of the assessors and the reasons to differ with them. In my understanding the appellant's counsel must have been referring to **Section 23 (1) and (2) of the Land Disputes Court Act R.E. 2019 and Regulation 19 (1) and (2)** which impose a duty on the chairman to require every assessor to present at the

conclusion of the trial of the matter to give his or her opinion in writing before making his/her final judgment.

I have visited the judgment delivered by the trial tribunal and at page 4, the chairman writes and I quote;

"In the end of the trial the two assessors Mrs. Temu and Mrs. Mmasi gave similar opinions that the applicant has failed utterly to prove the ownership of the disputed land thus, the application is to be rejected with costs."

As though not enough flipping through the proceedings, it is stated that, the assessors' opinions were read out to the parties before the judgment was pronounced. It is thus the settled view of this court, that the issue of the assessors and their role was well captured by the trial honourable chairman and was in agreement with the respective wise assessors.

In the upshot, I find no merit in the appellant's appeal and the same is dismissed with costs.

B. R. MUTUNGI
JUDGE
20/11/2020

Judgment read this day of 20/11/2020 in presence of the appellant and both respondents and Mr. Gideon Mushi for the respondents.

B. R. MUTUNGI
JUDGE
20/11/2020

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
20/11/2020