IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 27 OF 2020

(Originating from District Land and Housing Tribunal Moshi, Land Application No. 47 of 2018)

PHILEMON MUSHI ---------- APPELLANT

VERSUS

KALEBI RABSON SAMIAELI MWANGA --------- 1ST RESPONDENT

FATUMA AMINIELI SWAI ---------- 2ND RESPONDENT

JUDGMENT

MUTUNGI .J.

The appeal arises from the decision in Land Application No. 47 of 2018 before the District Land and Housing Tribunal at Moshi after which the appellant was dissatisfied with the judgment, orders thereto and has preferred the following grounds of appeal: -

(1) That, the trial District Land and Housing Tribunal erred in law and fact to compose opinions of the tribunal

member in its judgment and which were not embodied in the proceedings in the trial tribunal.

(2) That, the trial District Land and Housing Tribunal erred in law and fact to declare the suit land 20 x 80 paces the property of the second respondent while she had in evidence mentioned 28 x 90 paces.

(3) That the trial District Land and Housing Tribunal erred in law and fact in admitting the notice of sale of the disputed land, which was illegally conducted by the respondents.

(4) That, the trial District Land and Housing Tribunal erred in law and fact by admitting the sale agreement which was illegally written by the respondents.

(5) That, the trial District Land and Housing Tribunal erred in law and fact in weighing evidence of both sides since the second respondent was not the owner of the disputed land.

(6) That, the trial District Land and Housing Tribunal erred in law and fact in not considering, the adverse possession as the appellant who owned the disputed land since 1968 till todate.

Before venturing to the merits or otherwise of the grounds of appeal, the following is the background history of the dispute as captured from the record. The appellant who lodged his complaints with the trial tribunal was claiming for ¾ acres of land from the two respondents on the assertion that they had trespassed on the disputed land. His claims were backed by the version that, he had been given the said land by the Late Amaniel Andyoswai way back on 2/2/1968 and his wife PW5 was present. He thereafter built therein a butcher and the rest of the land was utilized as agricultural land. The said Amaniel Andyoswai was given a room therein.

In the 1990's Amaniel Andyoswai passed on. The appellant did attend his burial and no one raised any claims till the year 2017 when his son Estomi informed him that, the second respondent had sold the disputed land to the first respondent. He therefore started making a follow up in the trial tribunal. It was further established by the time he was given the disputed land the second respondent who apparently was the deceased's daughter had not been born.

His claims were supported by the testimonies of PW2 (the deceased's daughter, PW3, PW4 who renovated the appellant's house therein, PW5 the deceased's wife, PW6 and PW7. On the other side of the coin, the second respondent, apparently the deceased's second daughter gave, testimony to the effect that in 1988, her late father gave her the disputed farm to cultivate therein. There was also a butcher built therein in which her late father gave the appellant just a single room and Estomi and Ndesangiyo Ndosi were among the tenants in the said butcher. Fate had it that in 1990 her father passed on and at the funeral, no one raised any claims. It was not until the year 2017, that she decided to sale the disputed land together with the butcher to the first respondent. Before the sale transaction, she had publicly announced to everyone in the village after putting up a notice (Exhibit "D1"). After some reasonable time she entered into a Sale Agreement (Exhibit "D2") with the first respondent and the village officials dully witnessed the transaction. The appellant has his own butcher just adjacent to the suit land which has not been touched.

The first respondent on the other hand, had testified that he got wind of the sale of the disputed land and travelled all the way from Arusha. The information had come by way of a public announcement. Despite his acquaintance with the suit land he did make a through inquiry with the village authorities, and leant the disputed land had no encumbrance. A Sale Agreement was dully signed between him and the second respondent. The appellant's son one Dominic Mushi was among the witness together with Estomi Mushi (PW4). The appellant owned one roomed butcher adjacent to the disputed land which he had been given by the deceased (2nd respondent's father).

The first respondent remarked he remained peacefully on the disputed land from 10/3/2017 when he bought the same to May, 2017 when claims started mushrooming. The respondents' testimonies were supported by DW3 (the clan chairman) who knew the original owner as the second respondent's father who gave her the said land in 1988 before he passed on in 1990. He also witnessed the sale transaction between the two respondent. All that the appellant had was a small piece of land, with a butcher

built therein, adjacent to the disputed land. DW4 (the village chairman) had the same story.

Having deliberated upon the foregoing evidence, the trial tribunal found, there was credible and sufficient evidence to hold, at the time of the sale, the second respondent was the lawful owner of the land and hence had the capacity and authority to sale the same to a third party (the first respondent).

When the appeal was called up for hearing, the same was ordered be argued by way of written submissions. Mr. Shayo learned advocate representing the appellant submitted that, the opinions of the tribunal assessors were not recorded in the tribunal proceedings or in the judgment as envisaged by law. It is as though the judgment is of a single member (the tribunal's chairman). To support his stance, the learned advocate cited the case of **Sikuzani Saidi Magambo, Kirioni Richard vs. Mohamed Roble, Civil Appeal No. 197 of 2018 (unreported) CAT – Dodoma**. The same caters for the first ground of appeal.

Consolidating the 2nd, 3rd, 4th and 5th grounds of appeal, the learned advocate submitted that, despite the second respondent alleging that she had been given the disputed land by her late father but did not produce any kind of document to substantiate her claims. Further, the sale of the disputed land to the 1st respondent was illegal as the Sale Agreement was not legally written and there was no approval of the sale by the village land council as provided for under **Section 8 (2) and (3) of the Village Land Act, Cap 114 of 1999.** The first respondent did not notify the appellant nor the clan members of her intention to sale the disputed land. Be as it may, the second respondent by the time her father was giving away his land (disputed land) to the appellant, was not yet born and to the contrary her elder sister (the appellant's witness) was by then an adult and dully witnessed the alleged act.

The learned advocate stressed on the discrepancies in the sizes of the disputed land, whereas the trial tribunal stated 20 x 80 paces, the second respondent had mentioned 28 x 90 paces which means the second respondent was not sure of the size of the land she claimed.

The appellant's advocate in the end prayed, this honourable court finds merit in the appeal and proceeds to allow the same.

Mr. Kilasara learned advocate advocating for the respondents responded, first and foremost that at page 37 of the proceedings it is shown that after the defence case was closed and final submissions filed by the parties, the respective assessors did give their opinions, which were read over in the presence of the parties on 13/5/2020 and thereafter the judgment delivered on 20/05/2020. In that regard, there was no procedural irregularity to fault the proceedings and judgment of the trial tribunal.

As regards the second, third, fourth and fifth grounds of appeal, the learned counsel contended that, the pertinent issue, is the question whether there was sufficient evidence on the balance of probabilities to prove that the first respondent is the lawful purchaser and owner of the suit land which he bought from the second respondent. To this, it was the duty of the (complainant) appellant to prove that he owned a piece of land measuring three acres. To the contrary he kept on changing the sizes to ¾

of an acre and at some stage to 3 x 6 meters. It is very clear that, he was uncertain as to the size of the piece of land he claimed, while the rival side claimed the measurement of 28 by 80 paces given to the second respondent from 1988 by her late father. To cap it all (Exhibit "D2"), the sale agreement speaks loud on the actual size.

Further Exhibit "D1" (notice of sale) and "D2" (sale agreement) had been dully signed and admitted without any objections from the appellant and he was given an opportunity to cross examine on them. It is surprising that the appellant is at this stage raising objections.

The learned advocate further clarified that, there was ample evidence to support the second respondent's assertions and the same went to the first respondent. It is crystal clear from the evidence that, the late Amaniel Andyoswai was the original legal owner, who later be quitted the disputed land to his daughter (second respondent) who then sold the same to the first respondent as supported by Exhibit "D1", "D2", "D3" and "D4", She had full capacity and authority to sale or pass title to the respondent.

Lastly on the ground in relation to the principle of adverse possession, the learned counsel reacted that, this issue was never raised before the trial tribunal. The foregoing notwithstanding, the appellant's claim is the land allocated to him in 1968 to build a butcher therein which he still possesses uninterrupted to date. On the same footing the butcher area and the disputed land are two distinct lands which in fact are adjacent to each other. To put salt to the wound, the second respondent had for 28 years used the disputed land. If at all this is the reality, then it was expected of the appellant to adversely claim possession of the land from the second respondent short of which then the adverse possession was interrupted by the second respondent.

In the upshot, the learned advocate concluded the respondents' evidence pointed at nothing other than, the fact that the first respondent dully acquired ownership of the suit land by way of sale and the appellant was a mere trespasser thereon. It can concluded then the appeal is devoid of merits and subject to be sanctioned to a dismissal with costs.

Going back to the grounds of appeal I will follow the same chronological order as that of the written submissions. The first ground is premised on the issue of the opinions of the assessors. To answer the same, I had to visit the record of the trial tribunal in order to find out, if at all the trial chairman did follow the procedure laid down by the law. The section governing the proceedings at the District Land and Housing Tribunals particularly that involving the participation of assessors to be precise is **Section 23 (1) and (2) of the Land Disputes Court Act R.E. 2019**.

"The District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors. The same shall be required to give their opinions before the chairman reads the judgment."

In addition, Regulation 19 (1) and (2) of the Regulations impose a duty on the chairman to require every assessor present at the conclusion of the trial of the matter to give his or her opinion in writing before making his/her final judgment."

For the sake of clarity the said regulations are as hereunder;

(1) "The tribunal may after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later.

(2) Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require every assessor to present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.

The scenario in the trial tribunal record is such that, on 9/3/2020 before adjourning the hearing session, the chairman did make an order that on 15/4/2020 the assessor's opinion would be read out to the parties. Indeed on 13/5/2020 when the matter came up for hearing before Mrs. Judia Mmasi and Mrs. Theddy Temu did read over the assessor's opinions. For the sake of reference the record reads: -

"**Tribunal**: The matter is for reading assessors opinion. The same is hereby read as scheduled today."

Sgd: J. Sillas – Chairman

13/5/2020

The matter did not end up here, as the assessors' written opinions are dully filed in the court record. I am fortified that the opinions did meet the test of the law by the authority in the case of **Tubone Mwambeta vs. Mbeya City Council, Civil Appeal No. 287 of 2017** where the court observed: -

"Such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict."

Glaring through the written judgment (page 5) the honourable chairman did write and I quote;

"The assessors who sat with me throughout this case, Mrs. Teddy Temu and Mrs. Julia Mmasi unanimously opined that, this application be dismissed with costs because the applicant had no substantive evidence to prove his claims against the respondents who had a pretty good defence. Their opinions were read to the parties herein and for reasons advanced and based on the evidence on record, I have no reason to differ with their good opinion."

Considering the foregoing analysis, it suffices to find this ground fails.

Proceeding to the 2nd, 3rd, 4th and 5th grounds, I will answer the same generally, on the offset I will associate myself with the most common general rule of evidence that, he who alleges must prove the fact in issue and the same is provided for under **section 110 of the law of Evidence Act, Cap 6 R.E. 2019** which among other things provides: -

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

It follows therefore it was upon the appellant to prove that indeed the second respondent's late father had given him the portion of land now in dispute, which he claims was ¾ of an acre. He brought in evidence witnesses who simply support his claims by mere words that indeed in the year 1968 the appellant was given the said disputed land by the second respondent's late father where he built therein a butcher and gave the deceased a room therein, while he utilized the rest of the land for agriculture. He was surprised to learn that the late Amaniel Andyoswai after his passing away (1990), in 2017 his daughter (the second respondent) had sold the same to the 1st respondent. He claimed the piece of

land had the following boundaries to the North, road from Mula to Bwani, the South, farm of Ernest Elifuraha, East the farm of Ernest Elifuraha and on the West, the farm of Aleonasaa Andyoswai.

Having gone through the adduced evidence, this court is moved to find, this being a claim of land, more evidence was needed to substantiate the same. This is unlike the second respondent and the first respondent who brought documentary evidence to prove the passing of title between the two which was dully witnessed by the village officials. The appellant had tried to press upon the court to find, the documentary evidence tendered had no evidential value (the sale notice "D1" and Sale Agreement "D2") yet he had been given an opportunity to cross-examine the respondent but he never even objected. The fact that the suit land was publicly advertised is a clear indication that, had the appellant had any right over the dispute land would have objected to the same but appeared much later and landed in the trial tribunal.

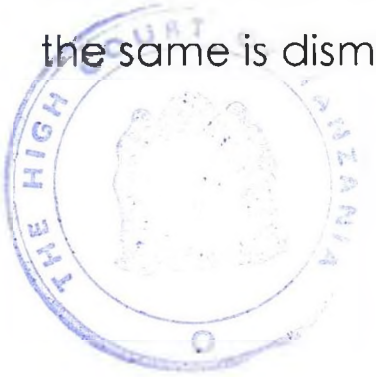
The appellant has also tried to impress the court that, he is covered by the doctrine of adverse possession having lived

on the said land since 1968 to 2017 uninterrupted. The law specifies under **part I of the law of Limitation Act, Cap 89 R.E. 2019** that the statutory period to claim land is 12 years. The appellant did not provide such evidence as the second respondent had alleged she was utilizing the suit land from 1988 and had also built a butcher therein. How then is it possible for the second respondent to enter on the suit land in 1988 to 2017 without being noticed by the appellant or the second respondent's relatives while the appellant alleges had witnesses who were around when the deceased was handing him the suit land and proceeded to remain silent.

As properly concluded by the trial tribunal the respondents' side had a stronger case hence these grounds also fail. It is obvious the second respondent had a good title to which she passed to the first respondent by way of sale.

There is the issue raised as to the actual size of the disputed land. As already noted earlier, it was upon the appellant to prove that which he was given but as already analyzed he had flimsy evidence hence he has no basis to query that which was granted by the trial tribunal.

All said and done, the court finds no merit in the appeal and the same is dismissed with costs.



B. R. MUTUNGI
JUDGE
27/11/2020

Judgment read this day of 27/11/2020 in presence of the Appellant and Mr. Kilasara Advocate for both Respondents.

B. R. MUTUNGI
JUDGE
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RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
27/11/2020