IN THE HIGH COURT OF TANZANIA
(MUSOMA DISTRICT REGISTY)

AT MUSOMA

LAND APPEAL NO. 45 OF 2019

(Arising from Appeal No. 201 of 2019 in the District Land and Housing Tribunal for Musoma at Musoma)

RHOBI BAGENI ..... APPELLANT

VERSUS

MATAGE NYAMBEGA .....RESPONDENT

JUDGEMENT

21/02/2020 and 17/03//2020

KISANYA, J.:

This appeal traces its origin from Land Application No. 25 of 2017 filed by the respondent before Buswahili Ward Tribunal (hereinafter referred to as the "trial Tribunal"), over the ownership of a piece of land located at Kongoto Village (hereinafter referred to as "the suit land"). While the respondent claimed to have bought the land from Chacha Garani in 1998, the appellant stated to have occupied the suit land in 1974.

In order to prove his, the respondent lined up other two witnesses. On his part, the appellant marshaled other three witnesses to object

the respondent claims. After considering evidence of both parties, the trial Tribunal was satisfied that the appellant had acquired the disputed land since 1974. Therefore, the appellant was declared the lawful owner of the suit land and the respondent's application was dismissed.

Dissatisfied with the said decision, the respondent appealed to the District Land and Housing Tribunal for Musoma at Musoma (hereinafter referred to as "the appellate Tribunal"). In its decision, the appellate Tribunal reversed the Ward Tribunal's decision. Thus, the respondent was declared the lawful owner of the suit land on the account that he had been on peaceful of the same for 18 years.

Aggrieved by the judgement and decree of the appellate Tribunal, the appellant has filed this appeal which is grounded upon four points.

1. *That, the Honourable Chairman erred in law and fact by holding that the suit was time barred while in fact, the cause of action arose in 2012 when the respondent brought stone trips on the suit land.*

2. *That, the Honourable Chairman erred in law and fact by holding that the Appellant had abandoned the suit land since 1981 while in fact the Appellant have been in possession of the suit land through conducting customary rituals every year on the said land.*

3. *That, the Honourable Chairman erred in law and fact by holding*

that the respondent have been in peaceful occupation of the suit land for more that twelve years while in fact the said respondent have never been in occupation of the suit land despite alleging to have purchased it since 1998 without producing any document of sale.

4. *That, the Honourable Appellate Tribunal erred in law and fact by deciding that the matter on adverse possession while the same not meet the requirement of adverse possession.*

At the hearing of this appeal, the appellant was represented by, Mr. Cosmas, learned advocate and the respondent appeared in person, legally unrepresented.

Submitting in support of the first ground of appeal, Mr. Cosmas argued that, the appellate Tribunal erred in law and fact to hold that the suit was time barred. He submitted that the dispute between the parties emerged in 2012, when the respondent invaded the suit land and not 1998. Citing the case of **John Mwombeki Byombalilwa vs Agency Maritime International Ltd (1983) TLR 1**, the learned counsel submitted that the cause of action began to run in 2012. He argued further that, the proceedings cannot be instituted if the time limitation has elapsed as provided for and rule 2 of the Customary Law (Limitation of Proceedings) Rules, 1963. Even if it considered that the proceedings were time barred, Mr. Cosmas argued that, the time was supposed to run against the respondent who instituted the proceedings before the trial Tribunal and not the appellant.

On the second ground, the learned counsel submitted that the land was not abandoned by the appellant from 1982. He submitted that the appellant acquired the disputed land in 1974. The learned counsel conceded the appellant to have moved from the suit land in 1981. However, he argued that the appellant did not lose its possession because he used to clear the land and perform the Kurya's customary and traditional rituals thereon, annually. Mr. Cosmass argued further that, pursuant to section 54(1) of the Land Disputes Courts Act, 2002, courts are duty bound to respect customs of the respective society.

Arguing on the third ground, the learned counsel submitted that the respondent had never occupied the suit land and that, it was in 2012 when the dispute arose. Thereafter, Mr. Cosmass pointed out contradictions on the plaintiff's (respondent) case. That, while the respondent testified to have no written document for sale of land, the seller, Mr. Chacha Garani (PW2) and PW3 averred that, there were documents on the sale of suit land. Mr. Cosmass argued further that the seller (PW2) could not own the land in 1978 because he was in standard four and hence, a child.

As to the last ground of appeal, the learned counsel argued that there was no adverse possession in the case at hand because the respondent claimed to have bought the suit land and that, the actual possession of the disputed land was not proved by the respondent. Mr. Cosmass cited the case of **The Registered Trustees of Holu Spirit Sisters Tanzania vs January Kamil Shayo and 136**

Others, Civil Appeal No 193 of 136, CAT at Arusha (unreported) to support his argument.

The learned counsel concluded his submission by arguing that the respondent failed prove his case on the required standard. Citing the the case of **Miller vs Minister of Pension** (1947) 2 ALLER 372, Mr. Cosmass argued that, the burden of proof was not discharged to the appellant. That said, he urged this Court to allow the appeal with costs, quash the decision of the appellate Tribunal and withhold the decision of the trial Tribunal.

In his response, the Respondent submitted that the appellate Tribunal considered the law of limitation. That, he bought the land from Chacha Garani in 1998 and that the dispute started in 2012, which was more than twelve years. The appellant submitted further that Chacha Garani (PW2) and PW3 testified how he bought the disputed land. With that short submission, the respondent urged this Court to dismiss the appeal with costs.

Mr. Cosmass rejoined by submitting, the appellant had conceded the dispute to have emerged in 2012. He was of the view that, the appellant was required to institute a case against the seller and that, it is not clear as to when the suit land was sold.

This being a second appeal, it is settled law that the second appellate can only interfere with findings of the lower courts if there is a misapprehension of evidence, violation principles of law or practice or miscarriage of justice. Therefore, I will consider this principle in

disposing of this appeal.

Having considered the evidence on record and submissions by both parties, I find that this appeal can be disposed of by addressing the issue whether the appellant was time barred from claiming ownership of the suit land and whether the respondent proved his claims over ownership of land on the required standards.

Starting with the first issue, it is true that the appellate court's decision was based on the ground that, the matter was extremely time barred against the appellant. Pursuant to item 22, Part I of the Schedule to the Law of Limitation Act [Cap. 89, R.E. 2002) and the Customary Law (Limitation of Proceedings) Rules, 1963, the time to institute the suit for recovery of land is twelve years. As rightly argued by Mr. Cosmass, the time limitation runs against the person who institute the case and not the defendant. Thus, the law of limitation protects the defendant against unreasonably delay in instituting of suit against him. This position was also stated by this Court (Mlay, J.) in **Humbalo Ferdinandi vs Marick Joseph Magubika**, PC. Civil Appeal No. 2 of 2002, High Court of Tanzania at Dar es Salaam (unreported), where it was held:

> *"The proceedings instituted by the appellant in the primary court, were for recovery of land from the respondent. It was not the Respondent who had instituted proceedings to recover land from the appellant so as the question of limitation did not arise.*

The proceedings in the matter hand was instituted before the trial Tribunal by the respondent against the appellant. It is the appellant who claimed Tribunal claimed ownership of the suit land before the trial Tribunal and not the appellant. Therefore, the question of limitation was not supposed to arise and run against the appellant.

Basing on evidence adduced by each party, the issue for determination before the trial Tribunal was whether the respondent was the lawful owner of the suit land. This brings us to the second issue whether the respondent proved ownership of the suit land on the required standard. It appears that decision of the appellate Tribunal was based on the adverse possession, when it held as follows:

> *"the respondent must have lost occupation of the suit land from as far back as 1981...There is also convincing evidence that the appellant had been on peaceful occupation of the disputed land for the time of 18 years, that is from 1998. In short, there is no any proof of actual possession on the part of the respondent as from 1981 up to the time this matter was referred this matter to in the Ward Tribunal."*

I agree with Mr. Cosmass that, adverse possession cannot be invoked if the owner claims to own the land through agreement for sale or lease. This position was stated in the case of **The Registered Trustees of Holly Spirit Sisters Tanzania** (supra), when the Court of Appeal held that:

> *"..it is trite law that the claim for adverse possession cannot not*

succeed if the person asserting the claim is in possession with the permission of the owner or in pursuant of an agreement for sale or lease or otherwise."

Further, a person who claims to acquire title of land by adverse possession, is required to prove eight requirements set in **The Registered Trustees of Holly Spirit Sisters Tanzania** (supra) that:

(1) there had been absence of possession by true owner through abandonment;
(2) the adverse possessor had been in actual possession of the piece of land;
(3) the adverse possessor had no color of right to be there other than his entry and occupation;
(4) the adverse possessor had only and without the consent of the true owner done acts which were inconsistent with enjoyment by the owner of land for purposes for which he intended to use it;
(5) there was a sufficient animus to dispossess and an animo possidendi;
(6) the statutory period, in this case twelve years had elapsed;
(7) there had been no interruption to the adverse possession throughout the aforesaid statutory period; and
(8) the nature of the property was such that, in the light of the foregoing, adverse possession would result.

The above requirements must be proved cumulatively and not in isolation. In other words, all requirements must be established and proved by the adverse possessor.

In the case at hand, the respondent averred to have bought the suit land from Chacha Garani, who claimed to have acquired it in 1978

when the same was allocated to him and his family. However, there is evidence the appellant and Ghati Bageni (DW3) which shows that the suit land was allocated to the appellant and his family in 1974. The respondent and his family lived on the suit land up to 1981 when they moved to another village. This is also proved by the grave of the appellant's mother which was stated to be on the suit land. In such a case, the suit land could not be allocated to the said Chacha Garani in 1978. Therefore, the manner in which Chacha Garani acquired the land sold to the respondent was not proved accordingly.

Even if it is considered that the suit land was acquired by Chacha Garani through adverse possession on the ground that, it had been abandoned by the applicant when they moved to another village in 1981, there is evidence from the appellant and Ghati Bageni (DW3) that the appellant and his family used to clear the land and conducting traditional and customary rituals each year thereon. The respondent conceded that fact when he was cross-examined by one member of the trial Tribunal. Therefore, it cannot be stated that the true owner had been absent through abandonment and that the said Chacha Garani was not interrupted throughout the statutory period of 12 years. In other, all requirements of adverse passion were not proved. I therefore, find that Chacha Garani who sold the suit land did not acquire it through adverse possession. In absence of evidence as to how Chacha Garani acquired the suit land, I find that he did not acquire title to the suit land, alleged to have been sold to the respondent.

Furthermore, even if it is considered that the respondent acquired the land in 1998, the appellant's evidence was to the effect that they used to clear the land and practice customary ritual every year. Also, the appellant testified that he moved in the suit land in 2007. For easy of reference his evidence is quoted hereunder.

> *.."2007 tumehamia eneo hilo na kusomba mawe na kuishi eneo hilo. Wakati huo MATAGE NYAMBEGA alikuwepo wala hakuweza kusema eneo hilo ni lake wala hakuweza kusema eneo hili amelinunua."*

The respondent was not cross-examined on the said evidence which shows how his ownership was interrupted before expiration of statutory period of 12 years. Therefore, the appellate Tribunal erred in holding that the respondent "had been in peaceful occupation of the disputed land for the time of eighteen years, that is from 1998."

I have noted further that, evidence on how the respondent acquired the suit land is not clear. As rightly pointed out by Mr. Cosmass, there are contradictions on how the respondent bought the suit land from Chacha Garami. While the respondent averred to have acquired the suit land on mutual understanding, the said Chacha Garani (PW1) and Wambura Nyambega (PW2) testified that there was written agreement. Further, the PW1 and PW2 testified that the suit land was sold when Chacha Garani had moved to Tarime. However, the respondent stated to have bought the land when Chacha Garani was living at Kongoto Village.

Apart from the said contradictions, the respondent and Chacha

Garani stated that the suit land was approximately 160 by 85 walking paces. However, upon visiting the *locus in quo*, the trial Tribunal found the suit land to have 141 by 80 paces. Therefore, the area of the suit land was not proved by the respondent.

In the premises of the above, I am of the considered opinion that the respondent failed to prove ownership of the suit land on the required standard, which is balance on probabilities.

For the aforesaid reasons, I find merit on the appeal. I accordingly, reverse the decision of the appellate Tribunal and declare the appellant as the rightful owner of the suit land as held by the trial Tribunal. Appeal is therefore allowed with costs.

Order accordingly.

DATED at **MUSOMA** this **17th** day of **March, 2020.**

E.S. Kisanya
JUDGE
17/3/2020