

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 10 OF 2019

*(From the decision of the District Land and Housing Tribunal of
Mbeya in Application No. 96 of 2016)*

KASIM NGIMBA.....APPELLANT

VERSUS

**ADIJA A. KAVINGA (An administratrix of the Estate
of the late Benito Joseph Kigwite).....RESPONDENT**

JUDGMENT

Date of the last order: 31/01/2020

Date of Judgment: 26/02/2020

NDUNGURU, J.

In this appeal, the appellant, Kasim Ngimba is challenging the decision of the District Land and Housing Tribunal of Mbeya (herein referred as the trial tribunal) in the Application No. 96 of 2016. In that trial tribunal, the respondent, Adija A. Kavinga sued the appellant for trespass over a farm land located at Itipingi Village within Mbarali District. The claim was opposed by the appellant contending that, he owns the disputed land for many years and also alleged that, he was

given the said disputed land by his late father by way of gift in 1980. He further contended that, his late father passed away in 1986.

Having heard the evidence tendered by the both parties together with their witnesses, the trial tribunal found that, the respondent's evidence was heavier than the evidence adduced by the appellant. Therefore, the trial tribunal declared the respondent to be the lawful owner of the disputed land.

The appellant dissatisfied with the trial tribunal's decision hence this appeal. The memorandum of appeal consists of the following five grounds of appeal:

1. The, the trial tribunal erred both in law and facts for entertaining the application which was filed out of time for the applicant/respondent to claim a deceased land out of prescribed time hence reached to awrong decision.
2. That, the trial tribunal erred both in law and facts for relying on exhibits tendered by the applicant used to prepare canal and without any locus to tender the village minutes, the same were not annexed to pleadings.

3. That, the trial tribunal erred in law and facts for favouring the applicant without considering and evaluating the defence evidence and hence reached a wrong decision.
4. That, the trial tribunal erred both in points of law and facts for failure to consider the time used to own land by the appellant.
5. That, the trial tribunal erred both in points of law and facts for declaring the respondent being lawful owner while her application was not proved to the balance of probabilities.

When the appeal was called on for hearing, Ms. Joyce Kasebwa learned advocate appeared for the appellant whereas Ms. Martha Gwalema learned advocate appeared for the respondent. The matter was argued by the way of the written submissions following the order of this Court and both parties have adhered to the scheduled order.

Arguing the first ground of appeal, Ms. Kasebwa submitted that, the application was filed out of time as per the Schedule of the Law of Limitation Act (Cap 89 R.E. 2002) specifically under item 22. She went on to submit that, the deceased passed away in 1997 and the suit was instituted in 2016. In a normal calculation there is a lapse of sixteen (16) years from the date the deceased passed away. To cement her argument, she cited cases of **Nassoro Uhadi v. Musa Karunge**

(1982) TLR 302, Balikuliye Mpunagi v. Nzwili Mashengu (1968, Yusuf Same & another Vs. Hadija Yusuf (1996) TLR 347 and Shilalo Masanje v. Lobulu Ngateya (2001) TLR 372.

She continued to submit that, the respondent applied for letter of administration for the estates of the deceased after 19 years and no reason stated for delay. She added that, a cause of action in this case accrues on the date of the death as per Section 91 (1) of the Law of Limitation Act (Cap 89 R.E. 2002). She cited the cases of **Job Mwanjisi v. Edward Momba & 12 others**, Land Appeal No. 18 of 2008 and **Dominicus M. Mvanba v. Thadei Mwangunga & the Registered Trustees of SDA Association**, Land Appeal No. 10 of 2016.

Submitting on the second ground of appeal, Ms. Kasebwa alleged that, the trial tribunal erred in both in law and facts for relying on exhibit tendered by the applicant used to prepare canal and without any locus to tender the village minutes, the same were not annexed to the pleadings. She invited this Court to read the cases of **Hawa Ng'umbi v. the Attorney & 2 others**, Misc. Civil Cause No. 107 of 2010 High Court of Tanzania at Dar-es-Salaam and **Lilian Onael Kileo v. Fauzia Jamal Mohamed**, Commercial Case No. 135 of 2013, High Court of Tanzania (Commercial Division) at Dar-es- Salaam (both unreported).

In the third ground of appeal, Ms. Kasebwa criticized the judgment of the trial tribunal on the ground that, it did not consider and evaluate the defence evidence. She cited the cases of **Hussein Idd & another v. Republic (1986) TLR 166**, **Lochart Smith v. Republic (1965) EA 211** and **Sadick Kitime v. Republic**, Criminal Appeal No. 483 of 2016, Court of Appeal of Tanzania (unreported) to bolster her submission.

Explaining the fourth ground of appeal, Ms. Kasebwa contended that, the trial tribunal erred in law and facts for failure to consider the time used to own the disputed land by the appellant. She went on to submit that, the appellant owned the land from 1997 up to date when the respondent instituted her claim over land in 2012 at Ward Tribunal. She cited the case of **Backinghamshire CC v. Moran (1990) Ch 623 (CA)**, a case of which established certain requirement to be met for a person to claim on adverse possession and the cases of **the Registered Trustees of the Holy Spirit Sisters Tanzania v. January Kamili Shayo**, Civil Appeal No. 193 of 2016 (unreported), **Ramsded v. Dyson (1866) LR 1 HL 129 at pg 140** and **Powell v. Macfarlare (1977) P & CR 38**.

In respect of the fifth ground of appeal, Ms. Kasebwa contended that, the respondent failed to prove her case on the balance of

probability as per Section 3 (2) (d) of the Evidence Act (Cap 6 R.E. 2002). She cited the case of **The Attorney General, the Treasury Registrar & The Caretaker Committee Friendship Textile Mill Ltd. v. Eligi Edward Massawe & 140 others**, Civil Appeal No. 86 of 2002, Court of Appeal of Tanzania (unreported). Finally, she prays the Court to allow the appeal and whole decision of the trial tribunal be quashed, and set aside and the appellant be declared the lawful owner of the disputed land and other orders this Court may deem just to grant.

In response to the first ground of appeal, Ms. Gwalema for the respondent submitted that, the respondent used the disputed land peacefully without any disturbance from any person up to the years 2012. She added that, the dispute started in 2012 when the appellant invaded the respondent land. She went on to submit that all cases and provisions of the laws cited supra by the counsel for the appellant are irrelevant and have no mantic to this case.

She continued to submit that, the cause of action pertaining this suit arose in 2012 when the appellant trespassed to the disputed land. Therefore, calculating the time within which the respondent was required to file a suit, the respondent was within time as per Section 5 of the Law of Limitation Act (Cap 89 R.E. 2002).

She further submitted that, the provision of item 22 of Part of the first Schedule of the Law of Limitation Act (Cap 89 R.E. 2002) which provide 12 years' time limit for suit to recover land must read together with Section 5 of the same law. She added that, the trial tribunal was not the Court which granted the letter of administration hence it had no room to question the legality of such letters of administration and even this Court has no such power.

In reply the second ground of appeal, Ms. Gwalema argued that, it is not true that the respondent tendered village minutes as exhibit rather she tendered the receipt for proof of the canal service which were admitted without any objection from the appellant's counsel and the same were annexed in the respondent's application. She went on to submit that, all decisions cited by the counsel for the appellant in support of her submission they do not fit in the circumstances of this case at hand.

Further, Ms. Gwalema reply that, the trial tribunal well evaluated the evidence adduced by appellant including his witnesses. She invited this Court to read page 3, 4 and 5 of the decision of the trial tribunal.

On the issue of appellant staying in the disputed land for more than twelve years, Ms. Gwalema submitted that, the appellant failed to prove elements of the adverse possession hence has no legs to stand.

She added that, all cases cited by the counsel for the appellant to support her argument on this ground are not applicable on the case at hand.

With regards to the fifth ground of appeal, Ms. Gwalema replied that, there is nowhere in the submission made by the counsel for the appellant which point out where exactly the respondent failed to prove the case on the balance of probability contrary to the case which she cited. She argued further that, the trial tribunal heard both parties and was able to evaluate the evidence adduced by each part to the dispute, hence adhered to the principle in reaching it's decision on the balance of probability. In conclusion, she prayed this Court to dismiss the appeal with costs.

In rejoinder, Ms. Kasebwa reiterates her submission in chief on the ground that the chairman who composed the judgment in favour of the respondent is against the law. Also she cited the cases of **Gachira v. Gachira (2009) 1 EA 138** and **Kipkebut T/A Riverside Lodge & Rooms and another v. Ogole (2015) 1 EA 332** to cement her contention. Finally, she reiterated her prayer that, the appeal be allowed and whole decision and orders of the trial tribunal be quashed.

After carefully reviewing the records of the trial tribunal and considering the submission of the counsel for the parties. Issue calling for determination is whether this appeal has merits or not. To answer this issue the Court sees it is prudent to dispose each ground of appeal.

Starting with the first ground of appeal, I had an opportunity of going through the record of the trial tribunal, there is nowhere the appellant raise this point during the hearing of suit at the trial tribunal hence, this Court find out that this is new fact. This position is well elaborated in the case of **Shilalo Masanje v. Lobulu Ngateya (supra)** which was also cited by the appellant's counsel, the Court categorically at page 375 stated that:

"I also notice that under paragraph 3 of the reply to the petition of appeal, the respondent has argued that in fact the matter before the Primary Court was time barred for being brought after 12 years from the date of the land in question. This may certainly be a very fine point to make. However, I am at a loss as to why the respondent did not raise this point at the very early opportune time i.e before the Primary Court, so that it would be considered and ruling made accordingly. I am very much alive to the principle that in law a point of law could be raised at any stage of proceedings but in the circumstance of this case and for reasons that will emerge hereunder, I still think that the proper forum for canvassing that was at the Primary Court".

Also in the case of **Nurdin Musa Wailu Vs. Republic**, Criminal Appeal No. 164 of 2004 (unreported) where the Court inter alia stated that:

"It will not look into matters which were neither raised nor decided by either the trial Court or the High Court".

From the words of the authorities cited above, the appellant was required to raise the issue of time limitation at the trial tribunal in order the trial tribunal to make ruling on it and not wait at this stage of appeal. Again it is not true that the issue of time limitation can be raised at stage of the proceedings as contended by the counsel for the appellant. Therefore, this Court found that this ground of appeal is an afterthought because the appellant did not canvass it at the trial tribunal hence, this ground of appeal lack merit.

Coming to the second ground of appeal, it is apparent on record that, the trial tribunal did not admit village minutes as exhibit rather receive it for the purpose to make decision on admissibility of it but the same was not admitted. Therefore, I subscribe to the submission made by the counsel for the respondent on the ground that only the receipt for proof of canal service which was admitted as exhibit. Therefore this ground of appeal also fails.

In the third ground of appeal, the learned counsel for the appellant has complained that, the trial tribunal did not considered and evaluated the defence evidence I do not agree with the submission advanced by Ms. Kasebwa because it is clear in the judgment of the trial tribunal that, it was considered and evaluated the defence evidence. This facts reflected at page 3 of the typed judgment of the trial tribunal, where the trial chairman inter alia stated that, *"the respondent's evidence was to the effect that he was apportioned the suit land by his late father one Maji ya Pwani Ngimba. That he was apportioned by way of gift inter vivos a total of 30 acres the suit land measuring 2.5 acres inclusive."*

And also at page 4 and 5 of the typed judgment the trial chairman evaluated and considered the defence evidence. Therefore, the argument advanced by the counsel for the appellant lack bases hence, this ground of appeal is rejected.

With regards to the fourth ground of appeal, my determination is that, looking at the evidence on record the appellant did not tendered any deed of gift to prove that the same he was given by his late father and the appellant did not prove the root of title of his late father. Also the record revealed that, the respondent used the disputed land for

cultivation maize at all time before the rise of this dispute. Further it is on record at page 15 of the typed proceedings, PW2 told the trial tribunal that, the village council before allocated land first looked if the land was occupied or not hence, it is not true that the appellant used the disputed land for 22 years because the disputed land which was allocated to the respondent was not owned by any person.


Therefore, the appellant did not prove the criteria on acquire title to land by adverse possession as alleged by the counsel for the appellant, I hold so because the record show that land disputed still was under the possession of respondent for cultivation. Therefore, this ground of appeal is baseless.

On the last ground of appeal, it is my opinion that, the trial tribunal evaluated well the evidence adduced by the both parties during the hearing of the suit and satisfied itself that the respondent had sufficient to prove her ownership. This facts confirmed by the evidence adduced by the respondent herself at page 8 of the typed proceedings to effect that, they made the application on 3rd day of September 1996 for allocation of disputed land by Itipingi village and she tendered the receipt to prove the same.

Again the evidence of the respondent corroborated by the evidence adduced by PW 2 and PW3 who was the members of the village council. Therefore it is not true that the respondent failed to prove her case on the balance of probabilities. Therefore there is no semblance of merit in the complaint.

In the end, in view of what I have observed above, I am satisfied that the trial tribunal was right to declare the respondent a lawful owner of the disputed land and accordingly, I find this appeal be bereft of merits. In fine, the appeal is hereby dismissed with costs.




D. B. NDUNGURU
JUDGE
26/02/2020

Date: 26/02/2020

Coram: D. B. Ndunguru, J

Appellant:

For the Appellant: Mr. Luko Deda – Advocate

Respondent:

For the Respondent: Present

B/C: M. Mihayo

Mr. Luko Deda – Advocate:

The matter is coming for judgment, we are ready.

Court: Judgment is delivered in the presence of Mr. Luko Deda
Advocate for the appellant and the respondent who is
present in person.




D. B. NDUNGURU
JUDGE
26/02/2020

Right of Appeal explained.