IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND APPEAL NO. 49 OF 2019

(Originating from Karatu District Land and Housing Tribunal Application No. 2 of 2013)

1. **YOSIA MANKALA**
2. **JOSEPH MWAGARA** ***(Suing as an administrator of the Estates of GEORGE KISSAY (deceased)*** **.....APPELLANTS**

Versus

THE REGISTERED TRUSTEES OF ELCT NORTHERN DIOCESE.....RESPONDENT

JUDGMENT

14th July & 8th October, 2021

MZUNA, J.:

Yosia Mankala and the late George Kessy who is now represented by Joseph Mwagara as the appointed administrator, were employees of the ELCT, Northern Diocese, the respondent. They were leased as tenants in staff quarters, but the farm project which made them stay in the quarters as employees, is no longer operating. The two appellants are among the seven employees who instituted the case at Karatu District Land and Housing Tribunal. The other five never even entered appearance before that tribunal.

The background story is that the claim is for land measuring ten acres located at Kambi ya Nyoka, Hanako Ward, Karatu. The basis of the appellant's claim is that after termination of their employment contracts they ought to

have been paid their terminal benefits including salaries due. They argue that the appellants and their fellows were granted the said suit land by the respondent through the consensus for compensation for their long and outstanding salaries/debt owned by the respondent. Failure to do so, made them remain in the suit premises. That since it is well over 12 years, they are owners by adverse possession.

The respondent says, since she has ownership title and the land being a registered one, title cannot pass. They are mere licensees.

The facts further show, the appellants and their fellows entered into occupation of the suit land before 1996 after the agreement with some parties whom they did not even call. They made developments including but not limited to buildings. Latter the respondent served them with notice of eviction prompting the instant application, to which the appeal relates.

The trial tribunal after framing three issues, including the issue as to whether the appellants are *bonafide* owners of the suit land, found that the appellant's claim is more of employment status than a land matter and therefore the tribunal lacked jurisdiction. They were therefore ordered to give vacant possession once and for all.

The appellant felt aggrieved hence this appeal which comprise of three grounds of appeal, namely:-

1. *That the Honourable chairman misapprehended testimonies of the Appellants and their witnesses consequently erred in law to reject the Application with costs.*
2. *That the Honourable chairperson erred in law to hold that the Application before him was employment matter and not a land dispute hence failed completely to adjudge that the appellants herein are lawful owners and or occupiers of their respective dispute land (sic).*
3. *That the honourable chairperson erred in law to hold and order that the Applicants (Appellants herein) should "give immediately a vacant possession from that suit land" in suo-motto.*

With leave of the court, the hearing was made through written submission. Mr. Dancun Joel Oola, learned counsel appeared for both appellants whereas Mr. Aloyce Qamara Peter learned advocate represented the respondent. During submission, Mr. Dancun abandoned ground three instead, decide to argue only grounds one and two.

The above two grounds of appeal, raises three issues, to wit; One, whether the chairman arrived to the decision without considering appellants' evidences?; Two, whether the chairman erred in deciding that the dispute was of employment rather than being land matter? and Three, what are the merits of the appeal in relation to giving vacant possession?

The two grounds of appeal were all argued together by Mr. Oola. He capitalised on the testimonies of the witnesses who testified for the applicants. He argued that they stayed in the suit land for so long which is

more than 17 years or so. He submitted further that, exhausted improvements were made to the disputed land the fact which was overlooked by the trial chairperson. He went on submitting that, if at all the respondent wished the appellants to vacate the land, would have fairly compensated them. To support his argument, he cited the case of **Attorney General vs Lohay Akonaay and Joseph Lohay** [1995] TLR 80 and Article 24 of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

Opposing the submission Mr. Qamara said that, the appellants admit that their parents had been in the registered land of the respondent by virtue of being the employees of the respondent. The learned counsel contended that the land in dispute is the registered one with title No. 10022 which was received and admitted by the trial tribunal as Exhibit ELCT1.

Mr. Qamara is of the view that, the learned counsel for the appellants is misleading the court by saying that the appellants' came into the suit land before the respondent and even before registration of the said land. The learned counsel says, even the testimonies of the appellants admits to have been leased the land by the respondent by virtue of being employees. This shows, they agree in principle that land belongs to the respondent. It is on account of this fact and exhibit ELCT 01, the certificate of title, he still insists that the suit land belongs to the respondent.

The appellants are not *bonafide* owners of the suit land because the evidence recorded by the trial tribunal is so apparent that there was no agreement with the respondent that appellants shall possess the land through consensual with the respondent. To cement his argument, Mr. Qamara cited the case of **Peter Michael vs Fabiola Gilyo**, Misc. Land Appeal No. 18 of 2018 (unreported) which reaffirmed the principle of non-exclusion of the host by the invitee whatever the lengthy of occupancy established by the case of **Mkakofia vs Asha Ndesia** (1969) HCD 204. Also Mr. Qamara reminded this Court the principle in the case of **The Registered Trustees of Holy Sprit Sisters Tanzania vs January Kamaili Shayo and 136 others,** Civil Appeal No. 193 of 2016 (Unreported) which reaffirmed that, permission or consensual occupation is not an adverse possession.

Mr. Qamara further submitted that, the claim by the appellants to have an oral agreement with the respondent in grant of possession of the suit land is false. To substantiate his argument, he said they even failed to prove that claim by evidence. However, the learned counsel rebuked such kind of claim by saying that even if such agreement existed, still it is inoperative and of no legal effect because it has no room to be accommodated on a registered land.

Mr. Qamara faulted the cited case of **Attorney General vs Lohay Akonaay and Joseph Lohay** (supra) as being distinguishable in the circumstances of this case because of two dissimilarities. One, in this case the

land is registered unlike the former. Two, in the former, the occupation of the land was before operation vijiji and the respondents were unlawfully evacuated whereas, in the case at hand, the appellants were invitees by virtue of being employees of the respondent.

With regard to the argument by Mr. Dancun that the chairperson erred in law to hold that the application was of more employment matter than land dispute, Mr. Qamara said, this argument is bound to fail and be dismissed with costs. He said, the Chairman properly scrutinized the testimonies and evidences on record. And therefore, was justifiable to hold that was of employment than being land dispute.

During his rejoinder Mr. Dancun, reiterated his submission in chief. He faulted Mr. Qamara's argument that the respondent came into the disputed land in 1955. He added, according to the certificate of title No. 10022 admitted in the tribunal as Exhibit ELCT1 shows that the land was prior owned by someone else known as Pieter Retief Pretorius Jones of Oldean. Mr, Dancan went on saying that, appellants cannot be said to be invitees to the disputed land because there is no apparent proof that the respondent was the owner of the suit land before 1955.

I have carefully combed the records of the trial tribunal in relation to the judgment and submissions for and against. On the first issue relevant for the first ground of appeal, I should say right from the outset that the

judgment composed by the learned Chairman clearly considered the evidence of both parties. At page 3 of the impugned judgment, the Chairperson clearly challenges the alleged ownership of land through Pasto Slaa who was not summoned, no documentary evidence as proof thereof more important also that he could not have passed property which he never possessed. This was in relation to the evidence of AW1 sifael Rajabu, AW2 Daudi mankala and AW 3 Fredy George Kissay. It is wrong to say that the appellants' testimonies were misapprehended. This ground is bound to fail. I so hold.

I revert to the second issue relevant for the second ground of appeal. The question of employment was at first introduced by Mr. Dancun himself when he was representing appellants at the trial tribunal. In his sworn affidavit, he is quoted saying under paragraph 5 that:-

> *"That, the Applicants herein were once upon time employed by the respondent and after devoting their energy and full potentialities in respondents employment they were terminated unjustly without being paid their dues and arrears an act that left them with no other option that to remain in the Respondent premises retaining the same as a lien for their dues henceforth the grant of the suit land to the Applicants as the settlement for the debt."*

The quoted paragraph of the said affidavit reminds the learned counsel what is averred in his deponed words. Mr. Dancun cannot lament that the Chairman raised the issue of employment *suo moto* while he, himself was the

architect of the argument at the very beginning. Having said so, this ground equally fails.

There is a new ground raised by Mr. Dancun during submissions on the issue of compensation for unexhausted improvements. To this, I would agree with Mr. Qamara that since it was not among the raised grounds in the memorandum of appeal, definitely being new, it cannot be raised at this appellate stage. I am fortified to this view by the case of **Makori vs Wassaga vs Joshua Nwaikambo and another** [1987] TLR 88 and the case of **Zaidi Baraka and two others vs Exim Bank (Tanzania) Limited,** Civil Appeal No. 194 of 2016 CAT at DSM (unreported). In the said case of **Zaidi Baraka and two others** (supra), the court held that:

> *"There is consistent judicial pronouncements that a point of law can be taken into cognizance and adjudicated upon at any stage of proceedings* ***provided that the facts admitted or proved on the record enable the court to determine the point of law in question. Since therefore, limitation is a legal issue*** *and since in this case, the claim was based on ascertained facts, the appellants were not precluded from raising it..."* (Emphasis mine).

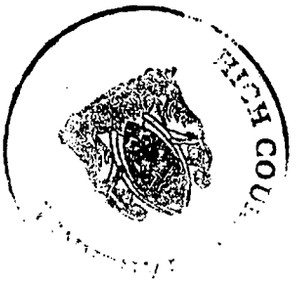
Even if it is for argument's sake, a party is compensated for something done as per the agreement. There is nothing which shows the respondent blessed construction of permanent structures on another's land.

I should say that issue of claim for land which is based on adverse possession for someone who has no legal title and they being mere licensees,

ownership under land claim cannot pass, instead should file a labour case claiming for their unpaid wages. The trial Tribunal was right to find that the matter was filed in a wrong court/tribunal. Even assuming it had such powers for argument's sake, still in view of what was held in the case of **The Registered Trustees of Holy Sprit Sisters Tanzania vs January Kamaili Shayo and 136 others** (supra) permission or consensual occupation cannot amount to an adverse possession. If the appellants are challenging registration of land in favour of the respondent, they ought to have joined the Registrar of titles.

That said and done, this appeal lacks merit. The appellants must give vacant possession immediately but not later than sixty days from today.

Appeal dismissed with costs.



M. G. MZUNA,
JUDGE.
08/10/2021.