

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT TABORA

LAND APPEAL NO. 18 OF 2019

(Originated from Land Application No.26 of 2015 Nzega Land and
Housing Tribunal)

SELINA MAPALALA..... APPELLANT

VERSUS

ASTERIA MASHULANO.....RESPONDENT

JUDGMENT

Date of Last Order: 17/9/2021

Date of Delivery: 24/9/2021

AMOUR. S. KHAMIS, J:

This is an appeal against the decision of the District Land and Housing Tribunal of Nzega in Application No.25 of 2015 whereby the respondent, Asteria Mashulano as administrator of Elizabeth Lufungulo successfully sued the appellant, Selina Mapalala, for trespassing into the land located at Tanuru hamlet, Uhemelo Village alleged to have been allocated to the respondent's late Mother by the Village Government.

The appellant unsuccessfully opposed the respondent's claim arguing that she is the owner of the disputed land alleged to have

been allocated to her by Village Government. She started developing the said land in 2013.

Upon hearing the evidence of both sides, the trial chairman entered judgment in favour of the respondent by declaring her lawful owner of the suit land. The appellant was declared trespasser and she was ordered to give vacant possession. The appellant felt aggrieved. Hence lodged this appeal and raised eight (8) grounds of appeal as follows:-

1. That the Honourable Chairman of the Tribunal erred in law and facts by considering hearsay evidence of the respondent that led him to the wrong decision thereto and without collaborating with other evidence.
2. That the Honourable Chairman of the Tribunal erred in law and facts for failure to make findings about the authority authorized to allocate the village land including the land in dispute.
3. That the Honourable Chairman of the Tribunal misconceived and misdirected on a mere contradiction of who was a caretaker of the disputed land when the appellant was far from the suit premises while such fact cannot in turn justify ownership of the disputed land by the respondent's deceased mother.
4. That the Honorable Chairman of the Tribunal erred in law and facts for failure to accord the evidence of appellant ownership of the disputed land which was allocated by the Village Government in 1978 supported by the evidence of DW2 who clear the land, DW3 who is neighboring both the appellant and the land of the

deceased mother of the respondent and was present during land allocation in 1978 which all these pieces evidence does not appear to contradict and the respondent did not counter or cross examine.

5. That the Honourable Chairman of the Tribunal erred in law and facts for failure to accord the fact that the appellant enjoyed a peaceful use of her land for over thirty-five (35) years since she acquired and nineteen (19) years since the respondent's mother died till 2013 when the respondent turned and claimed that she is the administrator of her deceased mother properties including the disputed land.
6. That the Honourable Chairman of the Tribunal erred in law and facts for failure to visit the disputed land contrary to its last order of 11/11/2016 and without ordering otherwise and that if the Tribunal would have paid visit to the suit premises it would have led the tribunal into correct determination of the disputed and thereby granting justice on the part of the appellant.
7. That the Honourable Chairman of the Tribunal erred in law and facts by considering demeanor of the appellant and her witnesses in reaching a judgment of ownership of land without the respondent tendering further proof of ownership of the disputed land by her deceased mother.
8. That the Honourable Chairman of the Tribunal erred in law and facts for failure to consider the size of the land

of the respondent's deceased mother which is 123*80 feet only excluding the disputed land appellant.

In this appeal Mr. Joshua Mhoja Malongo, Advocate represented the appellant whereas Mr. Samwel Ndanga appeared for the respondents.

Pursuant to the order of this Court dated on 16/6/2020 the appeal was disposed by way of written submission. Actually, I am grateful as both parties complied with the schedule and file their submission on time.

In support of the appeal, Mr. Malongo argued the first and second grounds jointly. He argued that the evidence of trial Tribunal did not show which authority was responsible to allocate the disputed land to the original owner the late Elizabeth John Lugungulo. He submitted that in the absence of any documentary evidence of ownership, it was vital for the respondent to prove to the trial which Authority allocated the Land to the respondent deceased mother.

He relied in submission on section 8 of the Village Land Act, Cap 114 R.E.2002 which gives power to the Village Council to allocate the village land. He therefore submits that the facts adduced by respondent was a hearsay fact as the allocation processed never testify if she was present during the allocation process and hearsay evidence is not admissible in Court.

He argued that the essence of corroborating doubtful evidence is vital when it comes to proving case. He cited the case of DPP Vs. Kilbourne [1973] C 729 at Page 50 whereby lord Reid held that:-

"once elaborated that when in ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether or not to believe a particular statement one naturally looks to see whether it fit in with other statement or circumstance related to the particular case; the better it fits in the more one is including to believe it. The doubted statement is corroborated to a greater or lesser extent by other statements or circumstances with which it fits in."

He submitted that the appellant during trial showed which authority allocated the disputed land to be the Village Government. Mr. Malongo also argued the third, fourth and fifth ground of appeal collectively. He argued that the respondent never cross examined most of the very important facts adduced by DW1, DW2, DW3 and DW4. He was of the view that the failure to counter or cross examine the counter party implies that the truth of evidence testified in support of his argument he relied on the case of **DAIMAN RUHELE V REPUBLIC CRIMINAL APPEAL NO. 501 OF 2007** (unreported) where it was observed that:-

"It is a trite law that failure to cross examine a witness on an important matter ordinarily implies the truth of the witness evidence....."

likewise, he cited the case of **GEORGE MAILI KEMBOGE V REPUBLIC, CRIMINAL APPEAL NO. 327 OF 2013** (Unreported) **CAT MWANZA**, where the Court observed among other things that cross examination is to test the credibility of the witness and failure of cross examine implied the truth of the fact.

Basing of the above authorities, Mr. Malongo contended that the facts adduced by DW1, DW2, DW3 and DW4 are strong piece of evidence which justify the appellant's title over the land in dispute which encompass some of the very fundamental principles of land including the principle of quite enjoyment of the land and developing the land by clearing the bush. He cited the case of **ATTORNEY GENERAL V LOHAY AKONAAY** (1995).

He also argued that the trial Tribunal among other things decided in favour of the respondent because there was a contradiction of the caretaker of the disputed land in absence of the appellant.

It is contended that the caretaker of the land in absence of the appellant was the respondent late mother from 1978 to 1993 when the appellant returned to stay in the village from Dar es Salaam. DW4 also testified that she was a co-care taker of the same land since 1978.

According to Mr. Molongo there was no contradiction for a property can have more than one caretaker taking into account that PW1, DW1 and DW4 are blood relatives and the fact that was not disputed by the respondent.

Mr. Malongo argued that the trial Tribunal was wrong for not visiting the locus in quo contrary to its last order on 11/11/2016 and without ordering otherwise. He therefore argued that the judgment was prematurely rendered, alternatively the tribunal should have called the parties and record in the reason for not visiting the locus in quo.

As to the seventh ground, it is argued that the trial Tribunal failed to observe and determine correctly the evidence of the

appellant's witness as a whole and that implies biasness on the part of the Tribunal. He added that the appellant testified many facts but the trial Tribunal never determine its credibility. He cited the case of **GODFREY MACHAGE V REPUBLIC [1977] NO.37** Katiti J, said when the question of credibility depends on the demeanor of the witness in Court, the trial Court stands at an advantage, but when the views, upon argumentative inference from disputed facts are to be made both the trial and the appellate Courts are in the same position.

Basing on the above, he argued that it is sensible and practical that the trial chairman failed to do so by comparing the evidence of the respondent vis a vis the appellant case hence biased judgement.

Arguing on the eight ground of appeal, Mr. Malongo contended that the respondent testified that the dispute land is 123 by 80 leg paces, while the appellant testified that the size of the land is 45 by 90 leg paces and no party ever challenge about the size of the disputed land. This implies that in the premises there two pieces of land adjacent to each other, one belongs to the respondent's late mother on the south and another for the appellant on the North. It is argued that if the size of the dispute land it claimed by the respondent would be more than 45 by 90 leg paces then it was obvious for the respondent to dispute.

In the end he prayed for the Court to allow this appeal with costs.

In reply Mr. Samwel Ndanga argued that the respondent during trial was able to prove the case on balance of probability that the land in dispute belonged to her late mother since 1978

allocated to her by the Village Government. He argued that this evidence was supported by evidence of PW2 who testified that the land in dispute was allocated to the respondent's late mother in 1978 and she was also allocated the land next to the respondent's mother. He also argued that the evidence of PW2 showed that the respondent's late mother was the first person to be allocated the land then herself and followed by one Omary Rwabika.

It is argued that from the availability of evidence plus the record of the District and Land Housing Tribunal the respondent had been there on the suit land for many years. The appellant has abandoned the suit land for more than 12 years almost 25 years from 1987-2013.

Mr. Samwel Ndanga added that by the time the respondent's mother was utilizing the land the appellant was not around even never tried to stop her to use it. He added that the dispute arose after the death of the respondent's mother in 1994.

He argued that there is no piece of evidence nor direct evidence to prove that the land was allocated to the appellant by village Government. It is argued that the appellant failed to disclose when and how the village Government allocated to her the disputed land.

He also insisted that the evidence of the appellant's witness contradicts each other. He stated that the appellant seems could not sure of what she testified to prove her right over the land. In her testimony she testified that the mother of the appellant was a caretaker of his land until when she died, while her witness DW4 said she was a caretaker since 1978 when the land was allocated to the respondent.

He argued that this doubt leaves unanswerable question which makes shaken and incredible evidence on the side of the appellant.

By way of rejoinder, Mr. Malongo reiterated his submission in chief and argued that the learned counsel for the respondent is trying to mislead the Court as there is no evidence to prove the authority that allocated the land in dispute to the respondent deceased mother. He also argued that the ten celler leader had no legal role in village land allocation.

He also argued that PW2 did not state which direction from the deceased mother she was allocated the land. Her evidence is doubtful taking into consideration that she testified to be a ten celler who witnessed the land allocation to the respondent's deceased mother meanwhile she stated that she was also allocated the land next to the respondent's deceased mother on the same day. He therefore, submit that the land belonged to the appellant and the respondent's deceased mother was just a caretaker with the right to use the land for growing crops.

Mr. Malongo contended that the appellant was able to prove that the land was allocated to her by Village Government in 1978 and gave to DW2 Maganga Nzile to clear the land for agricultural use.

He also argued that the facts for caretaker are not contradict each other because there can be more than caretaker taking into account that PW1, DW1 and DW4 are blood relatives^{2nd} none of them did develop the land except for growing crops until when the appellant elected a commercial house on the disputed land in 2013.

I have considered the grounds of appeal, the entire record of this appeal as well as the submissions presented by both sides which are in the record. Basically, the appellant is challenging the District Land and Housing Tribunal to have decided against the weight of the evidence and secondly, to have based its decision on the law of limitation.

Upon re-evaluating the evidence on record, I have noted that the evidence on record was properly and critically evaluated by the trial chairman and all the principals of evaluating evidence were adhered. It is my settled view that that since the appellant's allegations are based on the evidence. This being the appellate Court is not in a good position to assess the evidence properly as it only read transcripts unless otherwise the trial Court acts on a wrong principle in evaluating the evidence before, See the case of **MATERU LEISON & ANOR V REPUBLIC SOSOPETER** [1988] TLR 102 where it was held that and I quote;

"Appellate Court may in rare circumstances interfere with trial Court findings of facts. It may do so in instances where trial Court had omitted to consider or had misconstrued some material evidence, or had acted on a wrong principle or had erred in its approach to evaluating evidence."

This position was also fortified by the Court of Appeal of Tanzania in case of **ALI ABDALLAH SAID V SAADA ABDALLAH RAJAB** [1994] TLR 132 and it was held that:-

"In the absence of any indication that the trial Court failed to take some material point or circumstance into account, it is improper for the appellate Court to say that the trial Court has come to an erroneous conclusion. The Court further held that where the

decision of a case is wholly based on the credibility of the witnesses then it is the trial Court, which is better placed to assess their credibility than an appellate Court, which merely reads the transcript of the record.

In the light of the above, I am of the settled view that the decision of the trial Tribunal was proper as it based on the weight of evidence. The record shows during Trial the evidence of the respondent was more stronger compared to that of the appellant. There is no dispute to the fact that the respondent's late mother has been in occupation of the suit land even after the death of the respondent's mother the land in disputed have been in continues utilization of the respondent and her family.

The respondent was able to prove that her late mother was allocated the land since 1978 by the Village Government and this evidence was corroborated by the evidence of Elizabeth Ngwélele (PW2) who was there when the disputed land was allocated to the respondent's mother. She was also allocated the land adjacent to the respondent mother on the same day. to my view I find the piece of evidence adduced by PW2 during trial was very strong and believable because she was around when the land in dispute was allocated to the respondent's mother.

Moreover, the evidence of the respondent shows that her mother has been utilizing the said land since 1978 to 1994 when she died. The evidence further is clear that from that time of occupation, the respondent's mother and even after the death of her mother, the respondent has been in continuous use of the disputed land without interruption, cultivating crops and building a house therein. There is nothing in the evidence to suggest that

there were restrictions given to the respondent or her late mother in the use of the land or that the late respondent mother was just a caretaker as it is alleged by the appellant in her testimony.

In her testimony the appellant alleged to have been allocated the land in 1978 but she started developing the land in 2003 because she was away. This piece of evidence proves that the appellant neglected her purported land for more than 25 years.

In the light of the above, I consider that the disputed land was given/allocated to the respondent's mother on permanent basis. Therefore, it was proper for the trial Tribunal to declare the respondent as lawful owner taking into consideration that she was an administratrix of estate of her late mother.

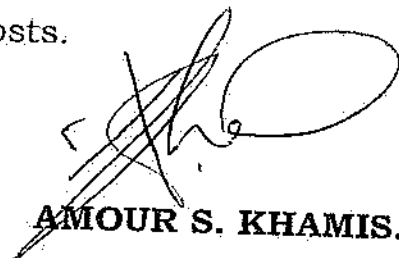
It is evident that the respondent's mother was in occupation of the said land since 1978 as she was allocated the same by the Village Government. The respondent continued in occupation of the land for over 12 years. That means the respondent has been in occupation for a period over 25 years since 1978 -2013 without being challenged by the appellant. It is a position of law that, long possession which is not interrupted gives right of land owned by another.

Under the equitable principle of adverse possession Mzava, J.K as he then was) citing with approval the cases of **SHABAN NASSORO V RAJABU SIMBA (1967) HCD 233** and **BALIKULIJE MPUNAGI V NZIWILI MASHENGU (1968) HCD 20**, held that: -

"Where a person occupies another land over a long period and develop it, and the owner knowingly acquiesces, such a person acquires ownership by adverse possession."

In the light of the above, I find the trial Tribunal was proper to declare the respondent as the lawful owner of the suit land basing on the principle of adverse possession.

In the premises, I do not find any reason to depart from the decision of the trial tribunal which is sound in law. Consequently, I find no merits in this appeal which is hereby dismissed. Each party to bear own costs.

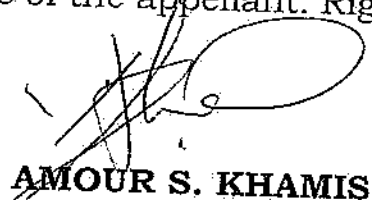
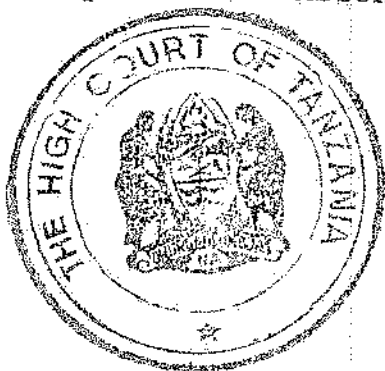


JUDGE

24/9/2021

ORDER:

Judgment delivered in chambers in presence of the respondent in person and absence of the appellant. Right of Appeal explained.



JUDGE

24/9/2021