**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF TANGA.**

**AT TANGA.**

**LAND APPEAL No. 33 OF 2020**

(Arising from Appeal No. 100 of 2019 of the District Land and Housing Tribunal for Korogwe at Korogwe and case No. 09/2019 Misima Ward Tribunal).

**ATHUMAN NGALENI ..... APPELLANT**

**VERSUS**

**ABED MOHAMED NGURUWE ..... RESPONDENT**

**J U D G M E N T**

**MRUMA, J.**

In the ward Tribunal of Msima in Handeni District the Appellant, Athumani Ngaleni sued the Respondent, abed Mohamed Nguruwe for a piece of land which is located at Makanya/Komkota area in Mbwagwi village, Msima ward in Handeni District, After having heard both parties together with their respective witnesses and visited the locus in quo, the ward tribunal decided that the land belonged to the Appellant's family, and the Respondent was a more invitee. The Respondent herein was

aggrieved, he appealed to the District land and Housing Tribunal of Korogwe on grounds that;

1. The ward tribunal erred in law and fact for failure to consider that the appellant has been in occupation over the disputed land for more than 12 years that he is protected by the law of limitation Act.
2. That the ward Tribunal erred in law and in fact to declare the Respondent as the rightful owner over the disputed and without considering the appellant witness and evidence adduced before the Tribunal.
3. That the honourable Tribunal erred in law and in fact for failure to consider that the appellant is on process of being granted certificate of customary right of occupancy over the land.
4. That the ward Tribunal erred in law and in fact to visit the locus in quo without involving the neighbours of the disputed land.
5. The Ward Tribunal erred in law and in fact for failure to consider that the Respondent has no locus standi to sue over the disputed land.

Having heard both parties, the DLHT decided that the appeal had merit relying on the fact that Abed Mohamed Nguruwe had stayed on the suit land for a long time hence acquired ownership of the same. this decision did not please the Appellant hence he appealed to this court basing on three grounds that;

1. the trial tribunal erred in law and facts when passed Judgment in favour of the Respondent that had occupied the suit land for long time in sheer regard that was a mere licence on the same having been licenced to temporary cultivate the same since 2012 by the appellants family.
2. The trial tribunal as first appellate court erred in law and facts when failed to evaluate well the tendered evidences by parties which justified claim by the appellant and not the Respondent.
3. The trial tribunal erred both in law and facts for passing judgment in favour of the Respondent in sheer regard of the concrete evidence adduced by the appellant with respect to his possession of the suit land.

In this court the Appellant was represented by Mr. Justus J. Ilyarungo while the Respondent was represented by Ms Zaudia Jacob, both learned advocates, considering that the Respondent's counsel had an infant could take care of, parties and the court deemed fit that the matter be disposed of by way of written submissions. Parties readily complied with the fixed filing schedule.

I find it nugatory to reiterate each and every submission by parties however I will sum it up for an easy grasp of what was submitted.

It was the Appellant's stance with regard to the first ground that it was clear that the Respondent did approach his family for a temporary licence/permission to cultivate the land as seen at pages 3, 4 and 5 of handwritten proceedings of the ward tribunal in the testimony of Mohamed Hassan Ngaleni and Yusufu Hassan Ngaleni.

He cited various case laws which are all to the effect that prolonged occupation of land by a licence does not vest title in the occupier (Merianangа Vs Asha Ndisia (1969) HCD No. 17.) he also cited the cases of Michael Vs Msario (1971) HCD No. 17 and that of Samson Mwambene Vs Edson James Mwanyingili (2002) TLR 1.

Mr Justus Further submitted on the second and third grounds which are interrelated that the evidence tendered by the Appellant in the ward tribunal was heavier than that of the Respondent.

The Respondent on his part, replied that he was not and invitee to the land as he cleared it as a virgin land since 1994. Also that, since the Appellant agrees that he had been occupying it for a long time before the death of their father in the year 2012 then he has acquired the said land by way of adverse possession. To his rescue he cited the case of **Nassoro Uhadi Vs Musaa Karunge (1982) TRL 302** which held that where a person occupies another's land over a long period and develops it, and the owner knowingly acquiesces, such person acquires ownership by adverse possession.

Before replying to grounds two and three, the Respondent criticized the Appellant's submission for having consolidated ground two and three without obtaining leave of this court, however he responded on the grounds that since the Appellant did not state how the re-evaluation of evidence was improper then the allegations must be taken to be baseless.

In his rejoinder, the Appellant maintained that the Respondent, being an invite to the suit land we cannot legally own the suit land. He therefore prayed that the appeal be allowed with costs.

In the course of composing this judgment I revealed that the tribunal proceedings did not disclosed sufficient particulars of the suit land the complaint tabled before the ward tribunal was;

> "Mimi Athumani H. Ngaleni pamoja na wenzangu kwa pamoja tunamlalamikia Ndg Abedi Nguruwe kwa kuendelea kulikalia **eneo letu** kinyume na makubaliano yetu, hivyo basi tunahitaji aitwe kujibu kwa nini aendelee kulikalia **eneo letu** kinyume."

However, both parties appeared to have enough knowledge of where the suit land was its boundaries and the issues between them as they all adduced evidence without hesitancy and called witnesses to support their respective positions. I am fully aware of the position of the law under section 45 of the land dispute court Act, Cap 216 R.E 2019 that no decision or order of a ward tribunal or district land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper

admission or rejection of any evidence unless such error, omission or irregularity or proper admission or rejection or evidence has in fact occasioned a failure of justice. Guided by the stated provision of the law, I am of the settled view that the omission to give detailed descriptions of the suit land under the circumstances of this case did not occasion any failure of justice, particularly so because parties know the land they were disputing over.

This being a second appeal, this court is under no obligation to re-hear the case by exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is placed on the first appellate tribunal or court. However, having perused the records of the lower tribunal it appears to that the firs appellate tribunal didn't discharge that duty, thus this court has to step into its shoes and discharge it. This court will therefore be obliged to weigh the evidence adduced in the trial tribunal and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as law. In so doing I will confine myself to the evidence on record.

At the trial, the burden of proof laid with the Appellant, Athumani Ngaleni who was the Applicant to prove that his family was the rightful owner of the suit land. In civil cases the test is not beyond

reasonable doubt as it is in criminal matters, but one side has to prove that its evidence is heavier than that of the other. That in essence is the balance of probability standard applied in civil trials.

The three grounds of this appeal will be more conveniently considered concurrently since they all relate to whether the Respondent was an invitee to the suit land or not and the manner in which the Appellate chairman went about in his scrutiny of the evidence tendered at the trial tribunal.

It is without doubt that at the trial tribunal the story line given out by the appellant and al his witnesses is an undeviating tale of how the respondent had married from the appellant's family and he together with his wife was invited to the suit land to live for some time while they resolve their marital issue. Later the respondent started to misbehave to the extent of selling some of the land that he was invited to when he was confronted about it, he confessed doing so and later returned some of the money. When Mzee Matibwili who invited him passed on the family wanted to distribute the estate amongst themselves and that s when the dispute arose as the respondent refused to vacate the place. All the witnessed gave a similar account of the facts and although there

was no document whatsoever that proved the respondent was only invited any reasonable man would believe this piece of evidence.

I have also recapped the Respondent's own words in defence at the ward tribunal and found this statement;-

"..... Hivyo niliporudi nyumbani jioni nikamkuta Mzee Matibwili kuwa kuna sehemu kule porini nimeiona kwamba inanifaa niifanyie kazi tukawa tunaongea tu ujue lakini kipindi hiko sikuwa na mahesabu ya kuishi mzeri **basi nikamwambia Yule babu kuwa nataka nifyeke ile seemu naye akanijibu basi hay** .....bas muda huo mimi sikufanya kaz naye akafariki."

This implies that before doing anything on what the Respondent termed as a virgin land, he consulted Mzee Matibwili for his permission.

I have also noted that the boundaries of the area which he claims is his own originally is bounded in all sides by Matibwili clan land if not still owned by the Matibwili then the occupant bought the same from a Matibwili family membet or the Respondent himself. This can be reflected from page 12 and 13 of the handwritten proceedings of the trial tribunal.

Moreover, it is on evidence that the Respondent one returned some amount of money that he falsely acquired by selling the land that did not belong to him. This fact the respondent has never disputed. Had it been an issue brought before this court, I would have also embarked on the lawfulness of the sale of land to one Rasta, by the respondent. Leaving that aside, this court without doubt finds that the respondent was a mere invitee to the dispute land.

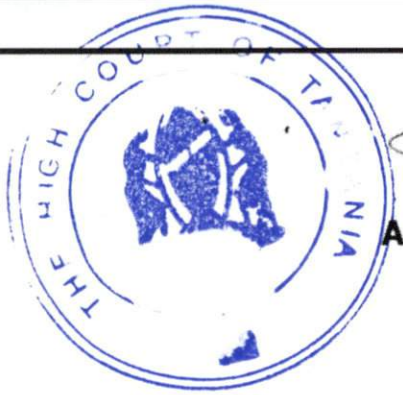
After finding that the Respondent was an invitee, it follows that the Appellate tribunal erred in holding that the Respondent's long occupation in it entitled him to own that land. The law is clear that no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made to the land on which he was invited. The court of Appeal sitting at Tanga in **Civil Appeal No. 101 of 2018 between Mussa Hassan Vs Barnabas Yohanna Shedafa (legal Representative of the late yohanna Shedafa, (unreported)** while discussing the principle of adverse possession, had this to observe;

> "We hasten the remark that the principle cannot apply in circumstances where the possession roots from the owner's permission or

agreement. We articulated this stance in Registered Trustees of Holy Spirit Sisters Tanzania Vs January Kamili Shayo & 136 other, civil Appeal No. 193 of 2016 (unreported in that case we observed at P. 24 where we subscribed to the position taken by the High Court Kenya in Mbira Vs Gauchuhi [2002] 1 EA 137 (HCK) wherein it was held":

"The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises; if the occupies right to occupation was derived from the owner in the form of permission or agreement, it was not adverse."

For reasons stated herein above this appeal is allowed. The decision and orders of the District Land and Housing Tribunal for Korogwe District in Land Appeal No. 100 of 2019 are quashed and instead the decision and orders of Misima Ward Tribunal in land Dispute No. 09 of 2019 are restored. The Respondent is condemned to pay costs.



**A. R. Mruma**

**Judge**

**30/11/2021**