



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

MISC LAND APPEAL NO.28/2019

*(Arising from Appeal no.6/2018 of Ngara District Land and Housing Tribunal
originating from Mbuba Ward Tribunal)*

JULIAN PASTORY RUBAVU..... APPELLANT

VRS

JUMA ILDEPHONCE ODAS CHALUKWAYA..... RESPONDENT

JUDGMENT

23/2/2021&5/3/2021

Kairo, J

Being aggrieved by the decision of Ngara District Land and Housing Tribunal before the hon. Chairman; R.E.Assey, the Appellant herein has lodged four grounds of appeal in the petition of appeal to impugn the said decision as quoted in verbatim hereunder:

- 1. That the trial tribunal embarked on determining a suit without assuring itself whether it had pecuniary jurisdiction.*
- 2. That according to the lower courts judgment the Respondent has not prescribed the boundaries of the suit land thus the proceedings thereto were incompetent for want of certainty of the order to be executed.*

3. That the lower courts erred in law to find the Appellant barred by the law of limitation whereas the cause of action arose at the time when he was alleged to have encroached upon the suit land.

4. That the decision was delivered against the doctrine of balance of probabilities.

The Appellant therefore prayed for the following reliefs:

a) To allow the appeal

(b) To quash the lower courts' decisions and or judgment.

(c) general damages.

(d) Costs

d) And any other and further relief this Court may deem just to grant.

At the hearing, the Appellant enjoyed the service of Advocate Chamani while the Respondent was under the representation of Advocate Raymond. Both parties opted to dispose this appeal by way of oral submissions.

In his oral submission, Advocate Chamani dropped the first and fourth grounds and remained with two grounds to argue for. While amplifying on the second ground of appeal he had a view that the decree from the DLHT cannot be executed as the DLHT did not describe the boundaries of the land in dispute and therefore there was uncertainty and the court lacked jurisdiction. He fortified his stance with the High court case of Daniel **Dagala Kanuda vs Masaka Ibeho and 4 others**; Land Appeal No.26 of 2015 at Tabora (Unreported) at pg 6. It was his further submission that on 1/12/2018 the court drew 4 maps relating to this dispute whereas each map concerned the witness who testified at the

tribunal that the said maps didn't show into which hamlet the dispute arose nor the village, neither the district. Besides, there was no measurement or size of the land in dispute. Mr. Chamani was therefore of the view that the omission to describe the land in dispute has made the decree to be non-executable.

As far as the 3rd ground is concerned, the Counsel for the Appellant had a view that it was wrong for the Ward Tribunal to have found that the Respondent owned the disputed land for more than 12 years since he bought, thereby concluding that the claim was time barred. According to him, the counting for the purpose of limitation would have started when the Respondent encroached the land and not the purchase date. To back up his position, He cited a case of **Ramadhani Mkoyela vrs Cassian Paulo** (1988) TLR pgs 56-57. The Appellant's counsel further contended that the Respondent didn't develop the land in dispute when he bought it and the evidence shows that he encroached it in August, 2017. He therefore concluded his argument that the issue of time limit and adverse possession is a misconception. To back up his argument, he referred me to a case of **Matondane vrs Didas Mawakala and others** (1989) TLR 210.

In reply, Advocate Raymond dismissed the second ground arguing that this court has no jurisdiction to entertain it as it is a new ground which was not addressed at the trial court nor was it raised as a ground of appeal at the appellate court (DLHT). He buttressed his position by citing the case of **Emmanuel Josephat vrs Republic**: Criminal Appeal No.323 of 2016, CAT at Arusha (Unreported) at pg 16 where the court held that grounds not raised at the first appeal cannot be raised at the second appeal.

The Respondent's counsel further contended that the dispute started at the village land council and later to the ward tribunal. That the village where the tribunal is found is known and the ward is known. Besides, the tribunal based its decision on the sale agreement where every particular pertaining to the sold land was described and boundaries were certain, together with the identification of the parties to the sell agreement. As such, it wasn't true that the land in dispute was not specified and described. It was the Respondent's counsel conviction that the decree is executable as the boundaries were described and therefore certain.

In distinguishing the cited case of **Daniel Dagala Kunda** (supra) from the one at hand, Mr. Raymond submitted that He is aware that the cited case discussed on the principle of ascertaining the land in dispute before execution but the case at hand originates from the ward tribunal where the complainant when filing a case has to fill a prescribed form into which among the requirement is to describe the land in dispute as per **item 3 of the second schedule to the land and District Court Regulation GN.No.174/2003**. He argued that the said requirement distinguishes the said case from the case at hand and thus prayed this ground to be dismissed.

With regards to the 3rd ground on limitation, Mr. Raimond responded that both lower tribunals were correct to rule out that the Appellant was time barred to claim the land in dispute. He clarified that the Respondent had bought the land in dispute from the relative of the Appellant one Salvatory Bihagara since 2000, further that the sold land wasn't a clan land as was obtained during operation Vijiji in 1972. Besides, since year 2000-2004 the Appellant was living with the seller until he died in 2004. Further to that, the Respondent was in possession of the land in dispute



and developed it by planting cow grass and grew trees there. That, if it was the Respondent who had encroached the land, the Appellant would be the first to go and claim it but didn't do that. The Respondent bought the land legally that is why the Appellant didn't take any step to sue the Respondent and that even at the ward tribunal, the Appellant was found to be the one who encroached the land in dispute. The Respondent's counsel further distinguished the cited case of **Matondane** (supra) from the current arguing that in the cited case the aggrieved party had no knowledge while in this case the Appellant had knowledge that the land was sold but took no steps to claim it instead he encroached it and when sued at the Ward Tribunal, he was found liable.

In rejoinder, Mr. Chamani refuted the Respondent counsel's argument with regards to the non-raising of a new issue at the appellate level arguing, that there is no proper procedure to that effect, he added that, non-describing of land boundaries is the legal issue as such it is immaterial whether the same was or wasn't raised at the lower tribunal.

With regards to the sale agreement, the Appellant's counsel stated that the same did not stipulate the size nor boundary marks. Further to that, it was not witnessed by neighbours and therefore the sale agreement is vague; he argued. He also dismissed the argument that people know the description of the village where the land in dispute belongs as the matter started at the village tribunal by stating the same to be baseless. The Counsel also added that what was referred to into the case of **Kunda (supra)** was a doctrine and therefore still relevant. He denied the argument that the Appellant knew of the sale agreement in year 2000 arguing the same not to be supported by record.

Having keenly considered the record and rival arguments from both parties, the issue for determination is whether this appeal has merit.

I will confine my discussion on the second and third grounds, as the Appellant's counsel has abandoned grounds number one and four.

In the second ground, the Appellant's counsel argues that the DLHT did not describe the boundaries of the land in dispute thereby leaving uncertainties which renders the decree unexecutable. The argument was strongly objected by the Respondent's counsel arguing it to be a new ground as it was not addressed at the trial tribunal nor raised at the first appellate court. While making his rejoinder, the Appellant's counsel submitted that the same can be raised at any time being a point of law which touches jurisdiction issue on execution.

I join hands with the argument by the Respondent's Counsel that this is a second appellate court which procedurally is not expected to receive or determine grounds of appeal not raised at the first appellate court [**Emmanuel Josephat v Republic** (Supra).] The Appellant had the opportunity to raise the same at the DLHT as one of the grounds if at all he thought that the description of the disputed land was vague. Bringing it at this stage is with due respect an afterthought as rightly argued by the counsel for Respondent.

Mr. Chamani's was further of the view that the ground is a point of law which can be raised at any stage of the proceeding. However, I beg to differ with him as the issue invites parties to adduce evidence (eg tendering the form filled to initiate the suit) as such contrary to the principal enunciated in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. vs WEST END.' DISTRIBUTORS LTD**

[1969] E.A. 696. After all the Appellant's counsel does not seek to challenge execution but the lower court's decision. Further to that I found the cited case distinguishable as it originates from the DLHT while the present one had its way from the Village Land Council where it was mediated before adjudicated at the Ward Tribunal into which the requirement of describing the land in dispute as per **item 3 of the second schedule to the Land and District Court Regulation GN.No.174/2003** is mandatory when filling the form to initiate the suit. It is therefore the finding of this court that the ground lacks merit.

Coming to the 3rd ground of appeal, the DLHT when confirming the Ward Tribunal judgment, based on the undisputed evidence that the Respondent Juma Chalukwaya bought the said land in dispute in year 2000 from the Appellant's brother, one Salvatory Bhangara and that the Appellant was outside the country (Burundi) in the year 1999 to 2000. The DLHT therefore on account of that evidence found the decision of the Ward Tribunal meritorious as the Respondent had possessed the land for more than 12 years.

The issue for determination therefore in this ground is whether the cause of action arose during the sale of the land in dispute to warrant adverse possession by the Respondent.

I wish to state that I struggled to peruse the entire proceedings to see the original document of the sale agreement which was tendered before the Ward Tribunal but in vain. Though I came across an annexure of uncertified copy in the DLHT file, but the same was too faint to read. Nowhere in the record of the trial Ward Tribunal shows that the document was tendered. But the dictates of law require for tribunals not to be bound

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by undue technicality in procedural dispensation of justice and given the fact that the purchase of the land in dispute in 2000 was not disputed, I considered the same to be the fact.

What the Appellant's counsel tried to challenge in the decision of the two lower courts was that, when the Respondent purchased and occupied the said land, he had no knowledge of the same. Besides, the Respondent did not make any development over there until in year 2017 when he invaded into the disputed land. Therefore, the cause of action accrues in year 2017 and not in year 2000 which means the issue of adverse possession cannot arise.

I am alive to the Appellant's concern that the issue of knowledge is of essence in determining the cause of action to accrue as cited in the case of **Matondane (Supra)** which was referred by the Appellant but let every case be determined by its own peculiar facts. Thorough scrutiny of the records convinced the court that the Appellant had knowledge that the Respondent purchased the said land but did not take any step to claim for the reasons best known to himself and I will explain shortly: It is clear that the Appellant testified to be outside the country in the year 1999 and 2000 but the rest of the years was inside the country as the period which he was in Burundi was in years 1999-2000 only. The other reason which shows that the Appellant was aware of the purchase of land by the Respondent is that the Appellant when testifying at the Ward Tribunal stated that the land in dispute belonged to his late father who obtained it from "*Operesheni Vijiji*" in 1975, he also mentioned all of his siblings, and those who are still living were mentioned to be Velina Pastory and Roza Pastory.

I paused to ask as to why the siblings did not object to the sale if at all the land belonged to their father having in mind, they are beneficiary as well and were present in the same village? In my view, Common sense negates the said proposition of unawareness by the sisters who were also residing in the same village as the Appellant himself testified. According to record, the land in dispute is just a piece of the parcel of land that belonged to the Appellant's late father which also suggests that the piece of land sold belonged to Salvatory Bihangara. Besides in year 2002, the Respondent himself made further developments by planting trees known as "*mihumula*" and he finally planted cassava in 2012 but with all those developments he got no objection while by that time the Appellant was already back from Burundi.

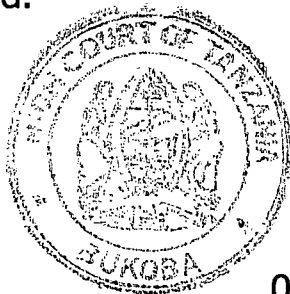
Although the Appellant has argued that he wasn't aware of the sale transaction as the Respondent did not utilize the land until in year 2017, but I beg to differ as the 2nd witness on the Appellant's side one Lazaro Joseph during cross examination stated that there were *mihumula* trees of about 5yrs old in the disputed land which were planted by the Respondent. The testimony negates the Appellant's contention that the land in dispute remained un-utilised until year 2017 to which he argued to be a reason of being un-aware of the sale transaction. I concede the principal in the cited case **Matondane vrs Didas Mawakala and others** (supra) but with much respect to Advocate Chamani, the case is not applicable in the matter at hand as the fact depicts on the balance of probability that the Appellant had the knowledge of the possession of the land in dispute by the Respondent, as such the argument is an afterthought. Besides that, the sisters whom he said were not involved in the said sale which suggest being unaware as well, weren't called to testify

on that fact, which again raise eyebrows as to why the Appellant did not call them to testify. Much as the choice of witnesses is the domain of the party, but in my view, the sisters were to be included into the witnesses to prove the ownership of the land in dispute when the same was sold. The omission has made this court to draw an adverse inference towards the Appellant.

From the above explanation I am persuaded that the cause of action arose on the sale agreement and thus concur with the concurrent findings of the two lower tribunals that the Respondent is a rightful owner of the land in dispute having legally bought the same from Salvatory Bihangara and possessed the same for over 12 years.

In the upshot, this appeal lacks merit and I hereby dismiss to its entirety with costs.

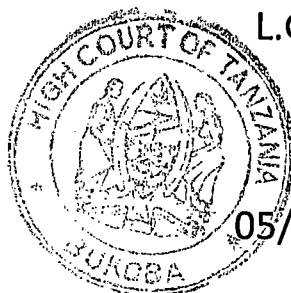
It is so ordered.



L.G. Kairo
Judge

05/03/2021

R/A explained.



L.G. Kairo
Judge

05/03/2021

Date: 05/03/2021

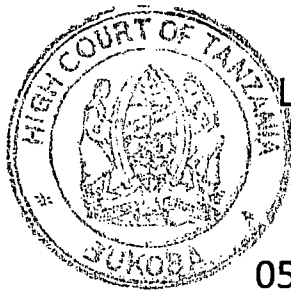
Coram: Before Hon. Kairo,J

Applicant: Present in person

Respondent: Present in person, Raymond Laurent Advocate also holding a brief of Adccocate Chamani for the Appellant.

B/C: Gosbert Rugaika

Court: The matter is for judgment. The same is read over in chambers before the parties' as per today's coram.



L.G. Kairo

Judge

05/03/2021