IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

MISC. LAND APPEAL NO. 9 OF 2020

(Arising from Land Appeal No. 73/2015 of the District Land and Housing Tribunal – Kigoma before F. Chinuku, Original Land Case No. 14 of 2014 from Bugaga Ward Tribunal)

SAMWEL KIKONDO..... APPELLANT

VERSUS

WILSON BIKULA..... RESPONDENT

J U D G M E N T

17th Feb. & 3rd March, 2021

I.C. MUGETA, J.

The respondent sued the appellant at the Ward Tribunal for a declaration that he is the lawful owner of the suit land. He claims title to that land after purchasing it from the appellant in 1992. There is no dispute that he has occupied and used that land since 1992. The parties live in the same village and there is no evidence that at any given time from 1992 to when the dispute arose, the appellant lived away from that village where the suit land is located. The appellant's case is that he just leased that land to the respondent upon being requested to do so by a friend.

Mugeta

The Ward Tribunal declared the respondent the lawful owner of the land. The reasons for the decision are not clear in the Ward Tribunal's Judgment. The appellant was aggrieved and he appealed to the District Land and Housing Tribunal where he also lost. The District Land and Housing Tribunal held that the respondent is protected by the law under the doctrine of adverse possession due to his uninterrupted long period usage of the land. The appellant has appealed to this court on the following grounds: -

i. *That, the learned Chairman misdirected himself by introducing new matters in his judgment and thereby leaving the appellant's filed grounds of appeal.*
ii. *That, the learned Chairman misdirected himself by raised (sic) the issue of adverse possession "suo moto" and determine it without involving parties to submitted (sic) regard that issue.*
iii. *That, the learned Chairman grossly erred in law and fact when he failed to deal with the issue of adverse possession as par (sic) evidence tendered as par (sic) the elements raised by the Tribunals.*
iv. *That, the 1st appellate Tribunal decision was illegal reached (sic), since even decision of the said Tribunal was aided by single Assessor but her opinion was not read to the parties before it was recorded.*
v. *That, the learned Chairman grossly erred in law and fact when he failed to scrutinize the cogent evidence as it were (sic)*

adduced by the appellant hence relied upon a flimsy evidence as it were (sic) adduced by the respondent, the evidence which did not prove his allegation.

The parties appeared unrepresented. Their submission is completely not useful to determine the merits and demerits of the grounds of appeal. I find no good cause to even reproduce them here.

I wish to state from the outset that this is a second appeal against the concurrent finding of two lower tribunals. Such finding, it is now settled, cannot be disturbed unless it is apparently clear that the finding is founded on a misapprehension of facts or misapplication of the law. I shall be guided by this principle in deciding this case.

The essence of the first ground of appeal is that the District Land and Housing Tribunal did not consider the grounds of appeal raised. Indeed, that Tribunal did not consider the grounds of appeal one after another. However, the general complaint in those grounds of appeal was the issue; who the lawful owner of the dispute land is. The learned Chairman considered that issue and held that it is the respondent by virtue of adverse possession. It is lawful to consider many grounds of appeal under one major complaint if it

fully and conclusively determine all complaints in the grounds of appeal. Therefore, there is no merits in the first ground of appeal. I dismiss it.

The second and third grounds are interrelated. I shall deal with them jointly. They relate to the application of the doctrine of adverse possession. Indeed, the District Land and Housing Tribunal decided the case on the principle of adverse possession. However, it is not right to argue that he applied the principle without involving the parties. While it is true that the applicability of that principle was not part of the grounds of appeal, there is concrete evidence on record about the period when the respondent started to enjoy use of the dispute land. Based on such evidence, the learned Chairman applied the principle and, therefore, the complaint that parties were not heard on the doctrine of adverse possession is misconceived. The learned Chairman interpreted the evidence to apply that principle. I dismiss the second and third grounds for want of merits.

The complaint in the fourth ground goes to assessors and it is two fold. Firstly, that only one assessor gave his opinion instead of two. Secondly, that the opinion of accessors was not read to the parties. I shall start with the first part. The record of the District Land and Housing Tribunal is clear that by the time judgment was composed the second assessor had retired. In

terms of section 23 (3) the Land Disputes Courts Act [Cap. 216 R.E. 2019], as quoted in that judgment, the learned Chairman was entitled to proceed with the remaining assessor. The law provides: -

> *'Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both assessors of the Tribunal who were present at the commencement of the proceedings is or are absent, the Chairman and the remaining assessor (if any) may continue and conclude the proceedings notwithstanding such absence'.*

The second part of the complaint also is without merits. While it is true that the opinion of the one assessor was recorded, filed and acted upon by the Chairman without being read to the parties, this omission cannot vitiate the proceedings. I understand that there are several decisions of this court and the Court of Appeal which states that such omission is a fatal irregularity. However, this depend on the origin of the proceedings. In **Fenesi Aman V. Janitha Kanubho,** Misc. Land Appeal No. 8/2020, High Court – Kigoma (Unreported), I held that that rule, depending on facts of each case, applies when the District Land and Housing Tribunal is exercising its original jurisdiction and not when exercising its appellate or revisional jurisdiction

because under such circumstances, the irregularity is saved by section 45 of the Land Disputes Court Act [Cap. 216 R.E 2019] which provides: -

> *'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 improper admission or rejection of evidence has in fact occasioned a failure of justice'.*

In this case the District Land and Housing Tribunal was exercising it's appellant jurisdiction, therefore, the omission is curable. The complaint in the fourth ground is without merits.

The fifth ground challenges the merits of the decision of the lower tribunals on assessment of the evidence on record. This is the ground of appeal which calls upon me to consider if the trial and the first appellant tribunal misapprehended the facts or misapplied the law. As I have said, the Ward Tribunal found for the respondent but reasons for the decision are not clear. This notwithstanding, I have examined the evidence on record and found

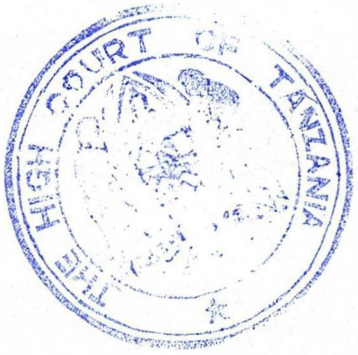
that the respondent proved his allegation that he bought the land from the appellant. His case was supported by Catherine Muyela who witnessed the appellant paying to the appellant Tshs. 14,000/= as unpaid balance for the sale of the 'shamba'. On his part the allegation by the appellant that he leased the land to the respondent is unsubstantiated. He failed to bring before the trial tribunal his friend who convinced him to lease the land to the respondent and no account is given for that failure. Therefore, on the balance of probabilities, the respondent proved his case.

The District Land and Housing Tribunal, however, misapplied the doctrine of adverse possession. In **Attorney General V. Mwahezi Mohamed** (as administrator of the late Dolly Maria Eustace) **and 3 others**, Civil Appeal no. 391/2019, Court of Appeal – Tanga (unreported) at page 12 it was held: -

> *'... the principle of adverse possession cannot be used as a weapon but a shield when one is sued for illegal possession of the land'.*

In this case it is the respondent who sued, therefore, the principle does not apply. The District Land and Housing Tribunal, therefore, misapplied the law. The misapplication of the law notwithstanding, the lower tribunal reached a

just decision that the land belongs to the respondent. The evidence is clear that he purchased it in 1992. Appeal dismissed. Costs to follow the event.



I.C. Mugeta

Judge

3/3/2021

Court: Judgment delivered in presence of both parties.

Sgd: I.C. Mugeta

Judge

3/3/2021