IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

LAND CASE APPEAL No. 28 OF 2019

(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in Application No. 45 of 2012)

1. MAKIU KAJWANGYA
2. KANDAIDA MUTEFUNYA ---------- **APPELLANTS**

Versus

DEOGRATIAS KASSINDA ---------- **RESPONDENT**

JUDGMENT

03/03/2021 & 15/03/2021
Mtulya, J.:

On 13th May 2019, the **District Land and Housing Tribunal for Kagera at Bukoba** (the Tribunal) in **Application No. 45 of 2012** (the Application) rendered down a judgment between Makiu Kajwangya (the First Appellant) & Kandainda Mutefunya (the Second Appellant) and Deogratias Kassinda (the Respondent) in favour of the Respondent to redeem a clan land in compensation of the payment of Tanzanian Shillings 6,000,000/= to the First Appellant. The Tribunal at page 12 of the judgment held that:

> *...redemption of the suit land by the Applicant by payment of Tshs. 6,000,000/= to the First Respondent. In respect of unexhausted improvement, there is no evidence*

advanced to prove the existence of the same. After redemption of the land, which has to be done in three months from the date of the judgment, the Respondents are also ordered to vacate and pay costs.

The reasoning of the Tribunal is found at page 10 and 11 of the judgment, in brief shows that:

It is not in dispute that the suit land belonged to Abagombe clan and the second Respondent sold the same to the First Respondent, a non Abagombe clan member...clan land cannot be sold to non-clan member without prior approval of clan members, and that where there are clan members who are ready and willing to buy clan land, such land should be sold to them...a person who wants to sale clan land must consult clan head to convene a clan meeting to deliberate on the issue of sale...the mere signing of the sale agreement by the clan members does not presume consent...they were just witnesses and their signature are of no effect as far as consent is concerned...

To justify its reasoning, the Tribunal cited a number of authorities in precedents, including: **Jibu Sakilu v. Petro Mumbi**

[1993] TLR 75 on the meaning of clan land and consent of the clan; **Nikolaus Komba v. Kondrad Komba** [1988] TLR 172 on selling of clan land to non-clan members; **Paul Alfred & Another v. Gervas Marianus** [1981] TLR 83 on the role of clan head; and **Agripina Fabian v. Augustine Mulashani**, Misc. Land Case Appeal No. 16 of 2015 on procedures in disposition of clan land.

The facts registered in the record of this Appeal shows that: The Respondent approached the Tribunal on 20th February 2012 and filed the Application alleging that Second Appellant on 19th March 2009 sold Abangombe clan land located at Kangoi Within Bugombe Village in Kanyigo Ward of Bukoba to the Respondent without following proper procedures of disposing clan land to a non-clan member. With reliefs, the Applicant claimed redemption order and return of the purchase price to the First Appellant, vacant possession of the land, general damages and costs of the Application.

After a full hearing in the Tribunal, the decision and reasons for the decision were rendered down in favour of the Respondent. However, the decision and reasons of the decision did not please the First Appellant hence on 13th June 2016 preferred the present appeal registered in **Land Appeal Case No. 28 of 2019**. The reasons of

appeal as depicted in the Petition of Appeal, briefly show that the Appellants are complaining on: first, time limitation on redemption of the clan land; two, evidences on unexhausted improvements; three, payment of 6,000,000/= as redemption money and compensation since 2009; and finally, order against the First Appellant's vacation and payments of costs.

When the appeal was scheduled for hearing on 3rd March 2021, both parties invited the services of learned counsels. The Appellants hired Mr. Joseph Bitakwate whereas the Respondent hired the legal services of Mr. Ali Chamani and Mr. Sethy Niyikiza to argue the appeal for them. After lengthy submission of learned counsels, it was vivid that the parties are in dispute on two matters, viz; position of the law in redemption period of clan land; and compensation in unexhausted improvements in a clan land which is under redemption.

During the submission, Mr. Bitakwate was the first to set the ball rolling and briefly submitted that the Tribunal registered, entertained and decided on a dispute which was out of limitation of time set in redemption of clan land as per requirement of the law in **paragraphs 560, 561 and 568** of the **Customary Law of the Haya**

Tribe printed in **Hans & Hartnoll in 1945** (the Book) and precedent of this court in **Leonance Mutalindwa v. Maliadina Edward** [1986] TLR 20; **Mzee Madrisa v. Rwanturaki Mulagirwa** [1977] LTR 57; and **Johansen Bachuba & Another v. Bonitus Justinian**, Misc. Land Case Appeal No. 18 of 2017. According to Mr. Bitakwate, the Respondent's claim in the Tribunal as is depicted in paragraph 6 (a) and 7 of the Application and when testifying said he received the news of sale a year after the sale of the clan land as depicted in page 27 of the proceedings of the Tribunal. Mr. Bitakwate also cited page 30, 34, 47 and 50 of the proceedings which show that the Respondent was aware of the sale in 2009, but brought an action in the Tribunal in 2012. To the opinion of Mr. Bitakwate the suit was filed out of three (3) months period as per requirement of the law and was supposed to be dismissed outright by the Tribunal as per section 3 of the **Law of Limitation Act** [Cap. 89 R.E. 2002] (the Law of Limitation Act).

On second ground, Mr. Bitakwate submitted that page 27, 34 and 40 of the proceedings in the Tribunal show that there are unexhausted improvements on the land, but the Tribunal stated that there are no unexhausted developments on the land. With respect to

Tshs. 6,000,000/= payment to the First Appellant as redemption money, Mr. Bitakwate contended that the Tribunal was wrong to deliver such an order as there were unexhausted improvements on the land. To substantiate his statement, Mr. Bitakwate cited the authority in paragraph 563 & 564 of the Book and precedent in **Angelo Bisiki v. Anthonia Bisiki & Others** [1989] TLR 225.

The submission of Mr. Bitakwate was protested by Mr. Chamani contending that the applicable law in the situations like the present one is **Item 6 of Customary Law (Limitation of Proceedings) Rules GN. No. 311 of 1964** (the Rules) which provides for twelve (12) years in recovery of customary lands. To bolster his argument, Mr. Chamani cited the authority in the precedents of **Yerenimo Athanase v. Mukamulani Benedicto** [1983] TLR 370 which held that redemption period of customary land is twelve (12) years; **Jibu Sakilu v. Petro Miumbi** [1993] LTR 25 which stated the meaning of a clan land and redemption period of clan land; and **Stephania Byabato v Francia Lwehabura & Another** (1974) L.R.T. 25 which displayed time limitation in redemption of clan land.

According to Mr. Chamani, in the cited precedents there analysis of both situations of limitation of three (3) months and

twelve (12) years periods of time and citation of subsidiary legislation emanated from parliamentary statute, and in any case there is no way customary laws can override statutory laws. On his part Mr. Niyikiza argued that the requirement of three (3) months period in redemption, even if there was no any Rules or precedents, is not a suitable paragraph to remain in the Book in this modern times. With conflicting decisions of similar court, Mr. Chamani submitted that the decision in **ULC Tanzania Ltd v. National Insurance Corporation** [2003] TLR 212 provides it all. With regard to the second ground, Mr. Chamani contended that it is a more of evidence and page 56 of the proceedings before the Tribunal shows that there were activities going on and a house, but no specific value of the properties were displayed.

In a brief rejoinder, Mr. Bitakwate submitted that the precedent in **Yerenimo Athanase v. Mukamulani Benedicto** (supra) interpreted the Rules which is clearly dealing with mortgage in land whereas the present appeal concerns sale of clan land to the non-clan member and redemption period of the same. According to Mr. Bitakwate, this court in the precedent in **Leonance Mutalindwa v. Maliadina Edward** (supra) discusses both positions of three (3)

months and twelve (12) years periods and opted in favour of paragraph 568 from the Book. With unexhausted developments in the land, Mr. Bitakwate submitted that the evidences in the Tribunal were obvious that the First Appellant had developed the land as depicted at page 27, 34 and 40 of the proceedings in the Tribunal. According to him, there were developments on the land that is why at page 2 of the proceedings of the Tribunal, the Respondent prayed for an order of the Tribunal to stop further developments on the land.

On my side, I think, this court is invited to determine an issue on time period in redemption of clan land sold to a stranger, which of course, was also an issue in a more than a-half a century ago in **Evarister Martin v. Tefumwa Tibishubwamu & Another** (1968) HCD 412, seven (7) years just after independence and four (4) years after enactment of the Rules via section 65 the **Magistrates' Court Act** [Cap. 537 of the Laws]. The precedents of this court on the issue have been moving back and forth in favour of the three (3) months period with distinct reasoning. It came in one time, this court was based its decisions in attraction in a number of cases decided in favour of three (3) months period of limitation. It is

unfortunate that the trend of uncertainty continued and the last one was spotted in the mid of 2019 in the precedent of **Johansen Bachuba & Another v. Bonitus Justinian** (supra).

Today, this court is confronted again to determine the same issue despite several precedents, past and present. In **Evarister Martin v. Tefumwa Tibishubwamu & Another** (supra) it was held that the period of limitation to redeem clan land in now twelve (12) years vide **Customary Law (Limitation of Proceedings) Rules, GN. No. 311 of 1964** whereas in **Johansen Bachuba & Another v. Bonitus Justinian** (supra) it was narrated that the parties, in the dispute like the present one, must be aware that customary period to redeem clan land among the Haya people is only three (3) months from the date of sale and that any claim filed after the period will fail with costs.

The challenges which this court faced in interpreting the Rules in 1968 is distinct from the current position where this State is now classified as lower-middle income status as per statics printed by the World Bank in 2019. The challenges in land matters and redemptions in clan lands are briefly stated by this court in a text

found at page 9 of the decision in **Johansen Bachuba & Another v. Bonitus Justinian** (supra). The text reads:

> *...it is very offensive and embarrassing to hear a claim of land against a person on a land which was bought many years ago. Many people in this area have been subjected to brain torture and stress as defendants in those cases. There are many cases of this type in court. My experience has shown that cases of this type are filed under a conspiracy of relatives with ill motives. Their motive include, but not limited to, hatred against people who are not the original people of the area, the desire to sell the land again to some other people at higher price... This is a bad practice and must be discouraged by the courts... where there are genuine claims, which are few, the parties must be aware that, the customary period provided to redeem clan land among the Haya people is only three (3) months from the date of sale...*

This is the current feeling of this court. However, in 1980s and immediately before enactment of the two land statutes in the **Land Act** [Cap. 113 R.E. 2019] and **Village Land Act** [Cap. 114 R.E.

interpret Item 6 of G.N. No. 311 of 1964 differently. In my judgment I take it that the paragraph envisaged two kinds of actions: firstly a suit to recover possession of land and secondly a suit to recover possession of money secured on mortgaged land. That would appear to be the plain and natural meaning of that para on its plain construction. ***If the rules envisaged limitation period for mortgaged land only as claimed, then it would have been a strange omission indeed because land disputes are quite prevalent in our varied customary law communities and no limitation period has been laid down by those communities except perhaps the Haya Customary law. It is absurd therefore to assign a negative intention to the law makers of 1964 rules that the alleged lacuna in the law was deliberate.*** *In the event the 1964 rules must be taken to have abrogated any earlier law on the subject and thus the 12 year period is the correct limitation period for redemption of clan land.*

That was the position and thinking of this court in 1980s, of course backed item 6 of the Rules emanated from the authority of

section 65 of the **Magistrates' Court Act** [Cap 537 of the Laws] and recognized under section 50 of the Law of Limitation Act. However, as I said in this judgment, during that time the **Land Ordinance 1923** was in place and had both colonial thinking and elements of the **Arusha Declaration of 1967** that lands in Tanganyika had no value save for unexhausted improvements.

Now, as it is rightly pointed out at page 9 of the precedent in **Johansen Bachuba & Another v. Bonitus Justinian** (supra) the law in the Rules is abused by dishonest natives in this jurisdiction. On my part, I think, I quoted a large text in the precedent of **Yerenimo Athanase v. Mukamulani Benedicto** (supra) which has answers to all raised issues in the proceedings of this appeal. Once there is precedent emanated from the interpretation of the Rules, this court cannot be detained to interpret the same Rules. The Rules must apply in this appeal as that is the law emanated from the authority of parliamentary legislation.

However, this is not only the court of law. It is also the court of justice to the parties and it is expected to win confidence from the parties and the public at large. It must decide cases based on facts, evidences and wisdom coupled with the prevailing circumstances of

2019], which recognized individual ownership and value in land, the interpretation of the law in the precedent in **Yerenimo Athanase v. Mukamulani Benedicto** (supra) favored the twelve (12) years period to fit with the prevailed circumstances. That was determined with a taste of the Rules as is depicted at pages 373 & 374 of the decision:

> *I am unpersuaded that such policy considerations should be used to override clear provisions of the law. It is for the legislature to amend the law if it is found wanting... it is my considered view that the law on the subject is substantially clean and needs no exotic interpolation. Yet the protagonists for the three month limitation period... concede that for the recovery of mortgaged land the limitation period is 12 years. It is argued that the para [Item 6 of the Rules, G.N. No. 311 of 1964] should be read as referring to a suit to recover possession of land or money both which have been secured on mortgaged land.... the paragraph, it is argued concerns two matters: first, a suit to recover possession of land secured on mortgaged land and secondly a suit to recover possession of money secured on mortgaged land. I read or*

each peculiar case. It would be inviting to call the text in Item 6 of the Rules to apply in the present appeal, but it is equally important fraudulent persons be dealt with when interpreting the same Rules. In my considered opinion, the question can be shifted from time limitation in redemption of clan lands, to the value attached on land at redemption time. There is a need to balance the protection clan land, which in some occasions contain graves of ancestors and interest of clan land buyers, who have added value on the land. In my considered opinion, any clan member who intends to redeem clan land must be ready to adjust buyers and be able to pay: costs of the land, costs of improving the land, costs during construction, and sometimes costs of psychological disturbances exerted to the buyers, and all to be assess by government experts or any other qualified individual on the specific named subjects.

Having noted all this and following analysis of this court, I hold that the time limit to redeem haya tribe clan land is twelve (12) years as per cited Rules and precedents of this court. Clan members therefore can redeem clan lands even after expiry of the three (3) months' time after the sale of clan lands to strangers. In any case, this will align with the principle of adverse possession enacted in *Paragraph 22 of Part 1 of the*

First Schedule to the Law of Limitation Act which had received precedents both in this court and Court of Appeal (see: **Registered Trustees of the Holy Spirit Sisters Tanzania v. January Kamili Shayo & 136 Others,** Civil Appeal No. 193 of 2016; **Shabani Nassoro v. Rajabu Simba** (1967) HCD 233; **Paskazia Bwahama v. Aloyce Salilo** (1967) HCD 117; **Shabani Nassoro v. Rajabu Simba** (1967) HCD 233; **Saidi Mfaume v. Rajabu Fuko** (1970) HCD 106; and **Zilaje V. Fembera** (1972) HCD 108.

It is fortunate with regard to the unexhausted improvements, both learned counsels are in agreement that there are improvements on the land, save for value of the attached properties. I also visited and perused the record of the Tribunal. Proceedings conducted on 20th February 2012 shows at page 2 that learned counsel Mr. Chamani for the Applicant prays the Respondents to be restrained from further developing the land whereas at page 27 PW1 states to have seen a stranger cultivating the land.

When PW1 was questioned by assessors on 25th July 2018 at the Tribunal, he admitted that the buyer occupies and developed the land. Again at page 40, when PW2 was testifying on 15th August 2018, he stated that the buyer developed the land. DW1 also testified that he had developed the land as from the proceedings of

19th March 2019 as depicted at page 47. Similar evidence is displayed at page 52 and 56 of the proceedings conducted on 20th March 2019 where building constructed by the First Respondent were spotted in the land.

As there are no disputes in the proceedings and submissions of the learned counsels with regard to the existence of unexhausted improvements in the land, and considering paragraph 563 & 563 of the Book, and noting the precedent in **Angelo Bisiki v. Anthonia Bisiki & Others** (supra), **Stephania Byabato v Francia Lwehabura & Another** (supra) and **Jibu Sakilu v. Petro Mumbi** (supra), this court shall grant what it considers right to the parties. I therefore formed an opinion to order the following: the Respondent is granted three (3) months leave to redeem the land from the date of this judgment; The Respondent to pay the First Appellant Tanzanian Shillings Six Million (6,000,000/=) in interest at the current Bank Rates from when he bought the clan land; the Respondent to pay the First Appellant costs of all unexhausted improvements effected on the land since it was bought to initiation of the Application in the Tribunal in interest at current Bank Rates; and the Respondent to pay the First Appellant compensation of psychological disturbances

exerted to the First Appellant at the tune of Tanzanian Shillings Five Hundred Thousand (500, 000/=). All assessment to be conducted by qualified government experts on their field of specialization or any other qualified individual person who may be consented by the First Appellant and the Respondent. Failure to fulfill the above stated orders, shall lead to forfeiture of the right to redeem clan land on part of the Respondent.

Having said so, this appeal is partly allowed without any order as to the costs. The reasons are straight forward. The Respondent initiated the suit in good faith and this appeal was partly contributed by the wrongs committed by the Tribunal in interpreting the Rules.

It is so ordered.

Right of appeal explained.

F.H. Mtulya

Judge

15.03.2021

This judgment was delivered in chambers under the seal of this court in presence of learned counsel Mr. Joseph Bitakwate for the Appellants and Fahad Omari for the Respondent.

F.H. Mtulya

Judge

15.03.2021