IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CIVIL APPEAL NO. 3 OF 2018

(Arising from Land Application No. 72 of 2018 before the District Land and Housing Tribunal of Mtwara at Mtwara delivered on 14th day of February, 2019 by Hon. S.H. Wambili, Chairperson)

ZUHURA ALLY HASSAN.....APPELLANT

VERSUS

AMINA ALFANI NAMMANJE.....RESPONDENT

JUDGMENT

6 June & 15 April, 2021

DYANSOBERA, J.:

The appellant herein is appealing against the judgment and decree of the District Land and Housing Tribunal of Mtwara at Mtwara in Land Application No. 72 of 2018 dated 14th February, 2019. The appeal is on the following grounds:

1. That, the trial Chairman erred in law and fact for not taking into consideration the principle of invitee in reaching to its decision.
2. That, the trial Chairman erred in law and fact by deciding the matter basing on the principle of adverse possession.
3. That the trial Chairman erred in law and fact that the respondent herein had no locus standi to sue the appellant.

A resume of the facts of the case is that parties are disputing on a farm situated at Makong'onda village, Makong'onda Ward in Masasi District estimated to be valued at Tshs. 10,000,000/=. The respondent claimed to have obtained it as a gift from her husband, one Salum Hamis Kandoyi (PW 2) and that she had been in occupation for a long time but then the appellant trespassed it. The respondent was supported in this by PW2. On her part, the appellant asserted that she was serving the farm which belonged to her father and the respondent was her neighbour. She testified that she had mortgaged the disputed farm to PW 2 who is the respondent's husband but that she delayed to redeem it. It was her assertion that when she went to redeem it in 2008, the respondent refused to hand it over to her.

In its judgment, the lower Tribunal, after visiting the locus in quo and evaluating the evidence, joined hands with the assessors who were of the unanimous view that the respondent had proved her case on the required

standard and found for her. It declared her to be the rightful owner of the suit premises and directed that the appellant had no right over the suit land she had trespassed in 2018 and was, consequently ordered to give vacant possession of the suit land to the respondent. It is this finding that aggrieved the appellant hence this appeal.

The hearing was conducted in writing and Mr. Ruta Bilakwata, learned Advocate submitted in support of the appeal. The respondent, on her part, *paddled her own canoe.*

Arguing the first ground of appeal, Mr. Ruta Bilakwata, learned Advocate who represented the appellant submitted that there was strong evidence that the land belonged to the appellant as DW1, the appellant, testified that she had mortgaged the suit farm in 1995 to the respondent's husband orally and the time was fixed to redeem it back. The appellant admitted to delay redeeming it up to 2008 when she approached PW 2 to redeem it, the latter turned against her on allegations that he had purchased it. Counsel was of the view that since the disputants seemed to be under agreement relating to the suit farm, the trial court was duty bound to consider the principle of invitee on reaching its decision.

With regard to the second ground of appeal, it was contended on part of the appellant that as the disputants were under the contract agreement,

the principle of adverse possession was inapplicable. Learned counsel cited the case of **Idi Tanu v. Obilo Nyamsanganya**, Misc. Land Appeal No. 27 of 2020 in which the case of **Mbira v. Gachuhi** [2002] 1EA 137 (HCK) to support his argument on the authority that if the occupier right to occupation was derived from the owner in the form of permission or agreement it was not adverse.

As to the last ground of appeal, Mr. Ruta Bilakwata submitted that the respondent had not *locus standi* to sue the appellant in that the claim that the respondent was given the farm by her husband as a gift was not established by evidence.

The respondent, in response to the first ground of appeal, argued that her ownership of the suit farm was proved to the required standard and the appellant's evidence failed to disprove the respondent's case. She maintained that she was given the land by her husband Salum Hamis Kandoyi way back in 1995 and has been in occupation for a long time cultivating both temporary and permanent crops.

With regard to the second ground of appeal, it was the respondent's argument that in finding for her, the trial Tribunal Chairman considered the weight of evidence of the parties and was satisfied that the respondent's evidence weighed heavier than that of the appellant particularly with long

and undisturbed occupation of the land. The respondent relied on the case of **Abdallah Mtandi v. Ramadhan Ikungu and Seif Muhoni**, Land Appeal No. 7 of 2009, High Court, Dodoma.

Answering the third ground, the respondent averred that she was at all the times in possession of the suit farm and PW 2 proved to have given the farm to her as a gift.

Having considered the submissions, the grounds of appeal and the records of the lower courts, the issue for determination is whether this appeal has merit.

As far as the first ground of appeal on the complaint of the appellant against the Chairman in not taking into account the principle of invitee is concerned, this court (Hon. Moshi, J. as he then was) in the case of **Samson Mwambene v. Edson James Mwanyingili** [2001] TLR 1 at page 3 had this to say:

> '...no invitee can exclude his host whatever length of his occupation ...it mattered for nothing that the appellant had even made unexhausted improvements on the land in dispute'

Likewise, this same court in the case of **Alphonce Mwita v. Papayai Kaloya** , Misc. Land Case Appeal No. 24 of 2010 held that:

'This court has consistently held that no invitee can exclude his host whatever the length of time the invitation takes place'.

The issue for consideration and determination is whether the respondent was invited to use that farm. Going by evidence, it was not controverted that the appellant had mortgaged the suit farm to PW 2 who is the respondent's husband. PW 2 admitted this issue of mortgage but added that the said farm was later sold to him. The appellant admitted to have mortgaged the suit farm to PW 2 and to have delayed to redeem it. She asserted that when she went to redeem it in 2008, the respondent refused to hand it over to her. Clearly, there was no evidence that the appellant invited either the respondent or PW 2 to use the land. There was no terms of the invitation be it oral or written nor were there any circumstantial evidence to prove the invitation which could be on whether the invitation was on temporary basis or the respondent was restrained from cultivating permanent crops or any other term. This ground of appeal fails.

Concerning the second ground of appeal on the application of the principle of adverse possession, I think the appellant has, through her learned Counsel misapprehended the gist of the decision by the lower court. A careful analysis of the decision and reasoning by the trial Tribunal

does not reveal that the decision was based on the principle of adverse possession. It was based on the long use without being interrupted. The decision of this court in the case of **Abdallah Mtandi v. Ramadhan Ikungu and Seif Muhoni**, Land Appeal No. 7 of 2009 was properly cited. In that case, this court (Hon. Mwangesi, J. as he then was) held:

> While it is true that in a situation where a person has been in use and/or in possession of a plot of land for a period of above twelve years without being disturbed, such person acquires ownership of the plot of land by the principle of adverse possession".

This principle however, applies in situation where the initial entrance or occupation to the plot of land at issue was illegal. Under such circumstances, whoever might had right over such piece of land, is assumed to have sat on his right for all that period and he is barred from claiming any further right over it.

As the evidence shows, there was no evidence showing that the initial entrance and /occupation by the respondent or PW 2 was illegal. I think the determination of the suit by the lower Tribunal was based not the principle of adverse possession but on the long and uninterrupted use by the respondent from 1995/1996 to 2018 when the appellant trespassed it

and the fact that the appellant's redemption, if at all it existed was time barred. This finding is clear at page 3 of the typed judgment of the trial Tribunal where it is recorded thus:

> Respondent has admitted that she has not used the suit farm from 1995-2018 on allegation that she mortgaged it to the applicant's husband. If it is true that the respondent mortgaged the suit land to the applicant's husband PW 2 the year 1995 and she has not redeemed it up to 2008 when she alleges to claim it from PW 2 at the Ward Tribunal respondent still was out of time of 12 years to claim to redeem land.
>
> Item/paragraph 17 of the 1st part of the Schedule of the Law of Limitation Act, Cap. 89 R.E.2002 sets 12 years to claim land as follows:

17. Suit to redeem land in possession of a mortgagee.....twelve years

> Yet, for all that time the respondent has not used the suit land as it has been under use and ownership of the applicant by being given by her husband the year 1995/1996 as stated by PW 1 and PW 2. Respondent emerged the year 2018 to trespass the suit farm which makes a total of 23 years the applicant has used/owned suit farm'.

The lower Tribunal supported its finding by relying on the cases of **Nassoro Uhadi v. Musa Karunge (1982)** TLR 302 and **Shaban**

Nassoro v. Rajabu Simba (1967) HCD 233 and the case of **Abdallah Mtandi v. Ramadhan Ikungu and Seif Muhoni,** Land Appeal No. 7 of 2009 (unreported). The second ground, too, collapses.

As regards the third ground of appeal on the argument that the respondent had *no locus standi*, this ground is, to be frank, misplaced. The issue of whether or not the respondent lacked *locus standi* was neither pleaded nor argued before the District Land and Housing Tribunal and, therefore, no finding was made on it.

In my view, an appellate court generally will not reverse the decision of the lower Tribunal based on an argument that was not presented in the lower court. Why? Lower courts adjudicate issues in the first instance, and their decisions should be reversed only when they make a mistake in assessing what is presented to them. If the lower court was not given the chance to pass on the argument, it is hard to claim that it made a mistake. This third ground is also devoid of merit.

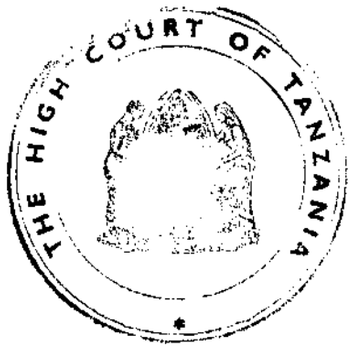
Indeed, it is settled that it is only in rare circumstances that an appellate court would interfere with the trial court's finding of fact unless the trial tribunal omitted to consider or misconstrued some material evidence or acted on a wrong principle or erred in its approach in

evaluation of the evidence. This legal position was emphasized by the Court of Appeal which is the highest court of land in the case of **Ali Abdallah Said Vs Saada Abdallah Rajab** [1994] TLR 132 where it held that in where a case is essentially one of fact, 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 instructively added 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.

The lower Tribunal heard the witnesses and assessed their demeanours. It believed the respondent. Besides it visited the locus in quo and evaluated the evidence. There is nowhere on record showing that the Tribunal omitted to consider or misconstrued some material evidence or erred in its approach in evaluation of the evidence.

The decision of the District court was justified and needs no interference.

For the reasons stated above, I find the appeal devoid of merit. Accordingly, I dismiss it with costs to the respondent.



W.P. Dyansobera

JUDGE

15.4.2021

This judgment is delivered under my hand and the seal of this Court on this 15th day of April, 2021 in the absence of the appellant but in the presence of the respondent.

W.P.Dyansobera

JUDGE