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

**LAND CASE APPEAL NO. 45 OF 2020**
(*Arising from Bukoba District Land and Housing Tribunal in application No. 137/2014*)

**JOVIN ALBERT BARONGO.....APPELLANT**
***VERSUS***
**EVERIGIST MUGISHA VEDASTO.....1ST RESPONDENT**
**PROF. BEDA MUTAGWABA.....2ND RESPONDENT**

**JUDGMENT**

*25th May & 11th June 2021*

***Kilekamajenga, J.***

The appellant was appointed to administer the estate of his late father Albert Ilalyona in 2003 by Buhendangabo Primary Court. It is alleged that his father died in 2002. Before his death, the late Ilalyona sold part of his land to the 1st and 2nd respondent. According to the appellant's averment, when he was identifying his father's property for distribution to the lawful heirs, he realised that the deceased's property which was located at Kabengwe was encroached by the respondents. In 2014, he filed this suit seeking an order for declaration that such land belonged to the late Albert Ilalyona and the respondent were trespassers.

During the trial of the case, the appellant testified that his father died in 2002 leaving behind a will. The appellant was appointed to administer the estate of his

father in 2003. When perusing the documents of his father, the appellant later realised that the late Albert Ilalyona bought a forest of eucalyptus trees at Kabengwe from Evarista Kashaga at the price of Tshs. 7,500/=. In 2008 when the appellant was identifying the deceased's estates for distribution to the heirs, he realised that the land at Kabengwe was encroached by the respondents. The appellant's testimony was supported by PW2 who also testified that the respondents trespassed into their father's land. PW2 further confirmed that his father sold the land to the 1st respondent. But the two respondents have encroached into the land of their father. He noted the encroachment in 2008.

During the defence, the 1st respondent testified that he bought three pieces of land at Kabengwe from three different persons namely: John Rwiza, Albert Ilalyona and Paschal Mtekanga. He bought the land from John Rwiza on 03rd August 1997; from Albert Ilalyona on 1st November 2000 and from Paschal on 31st October 2007. His sale agreements were witnessed by village leaders and neighbours of the respective areas. When he bought the land from Albert Ilalyona, the sale agreement was witnesses by Grace Albert who was the grandchild of the seller; Albert Rugaika and Justinian Emmanuel were neighbours. When he bought the land in 1997, he commenced construction and that is his current place of residence. The 1st respondent further confirmed that

the 2nd respondent also owns a land at Kabengwe and they are neighbours. DW1 tendered the sale agreements which were admitted.

DW2's testimony shows that the 1st and 2nd respondents are his neighbours at Kabengwe. DW2 also confirmed that the late Albert Ilalyona sold the land to the 1st respondent in 2000 and he also witnessed the sale agreement. DW2 vehemently denied the allegation that the 1st respondent encroached into the land of Albert Ilalyona because he bought it.

On his part, the 2nd respondent testified that he knew the late Albert Ilalyona. The late Albert Ilalyona previously lived in their village but later shifted to Karagwe where he lived until he died. Albert Ilalyona had two pieces of land; the one with shops and the other with eucalyptus trees. The 2nd respondent bought the land with eucalyptus trees in 1997 and 1998. He also bought a third piece of land from the same person in 2000. In 2008, there was no piece of land owned by Albert Ilalyona at Kabengwe. The 2nd respondent mentioned some of the persons who bought land from Albert Ilalyona as Archard Katabaro, Benedicto Machunkwa and the 1st respondent. However, when Albert Ilalyona availed the land for sale, the 2nd respondent was away, so he instructed his young brother (DW4) to buy the land on behalf. He tendered the sale agreements which were admitted during the trial. The testimony of the 2nd respondent was supported by

DW4 the young brother of the 2nd respondent who purchased the plots on his behalf.

Finally, the District Land and Housing Tribunal decided in favour of the respondents. The appellant preferred an appeal to this Court armed with eight grounds of appeal. When parties appeared to argue the appeal, the appellant was present and enjoyed the legal services of the learned advocate, Mr. Alli Chamani whereas the 1st respondent was present and represented by the learned advocate, Mr. Lameck John Erasto and the 2nd respondent was absent. The court ordered the matter to proceed in absence of the 2nd respondent.

In the oral submission, the counsel for the appellant argued that the issue discussed by the trial tribunal on time begins to run from the date of sale of land was raised *suo motto* by the tribunal because it was not among the issues for determination during the trial. Mr. Chamani was of the view that time begins to run after the owner of the land realises that his land is encroached. He supported his argument with the cases of **Ramadhani Nkongela v. Kasiano Paulo [1988] TLR 56**; **Kapapa Kumpindi v. The Plant Manager, Tanzania Breweries LTD, Civil Appeal No. 32 of 2010**. As the issue of time limitation was raised during the writing the judgment, the appellant was denied the right to be heard.

On the 2nd and 5th ground of appeal, Mr. Chamani argued that the respondents did not follow the procedures in buying the land as they failed to get consent of clan members or involve neighbours of the respective areas. Furthermore, the boundaries of the land were not set after the purchase of the land. He argued further that the 2nd respondent did not witness the land he bought and the same land was therefore not identified. He insisted that the pieces of the land were bought by DW4 but there was not instruction from the 2nd respondent. He invited the court to consider the case of **Charles Katesigwa v. John Bosco Lwabutiti, PC Criminal Appeal No. 88 of 1991**. In Mr. Chamani's opinion, documents must speak themselves as it was stated in the case of **Tanzania Fish Processors LTD v. Christopher Luhanyula, Civil Appeal No. 21 of 2010**, CAT at Mwanza (unreported).

Mr. Chamani further argued that the sale agreements do not prescribe the size of the disputed land. He urged the Court to invoke the principle stated in the case of **Daniel Dagala Kanuda v. Masaka Ibeho and others, Land Appeal No. 26 of 2015**, HC at Tabora. He further blamed the trial chairman for putting much emphasis on the will which, so far, was not tendered. However, even oral testimony is sufficient to prove a case as it was stated in the case of **Eusto K. Ntagalinda v. Tanzania Fish Processors LTD, Civil Appeal No. 23 of**

**2012**, CAT at Mwanza. On the 8th ground, Mr. Chamani argued that the appellant's evidence was supported with one witness and such evidence was not analysed. He urged the court to allow the appeal.

In response, Mr. Lameck for the 1st respondent argued that the time limit was gauged by the trial tribunal based on the evidence adduced because the 1st and 2nd respondents used their pieces of land since 2000 when they purchased from the appellant's father. He further argued that, despite challenging the sale agreements, the counsel for the appellant did not deny the fact that the respondents purchased the land from the appellant's father. It was not proper for the administrator of estates to challenge the sale of land done by the deceased. Also, the sale agreements were approved by village leaders and clearly stated the location of the land.

Furthermore, Mr. Lameck was of the view that the trial tribunal was right is drawing adverse inference on the failure to tender the will because the will seemed to state the size of land sold to the respondents by the appellant's father. It is very unfortunate that the appellant tried to tender the will but withdrew it. The counsel insisted further that the appellant failed to prove his case. He urged the Court to consider the case of **Abdul Karim Haji v. Raymond Nchimbi Aloyce [2006] TLR 420**. Mr. Lameck submitted further

that parties cannot tally but a party with heavier evidence wins the case as it was stated in the case of **Hemed Said v. Mohamed Mbiru [1984] TLR 113**. He finally urged the Court to dismiss the case with costs for want of merit.

When rejoining, Mr. Chamani insisted that the appellant's case was heavier than that of the respondent. There is no doubt that the appellant's father sold pieces of land to the 1st and 2nd respondent but the major contention is on the size of the land sold. He insisted that the parties were supposed to be given the right to be heard on the issue of time limit. He finally reiterated his prayer.

After considering the submissions from the parties and the grounds of appeal advanced by the appellant, the major issue for determination is whether the appellant proved his case. Under the law, a civil case must be proved on the balance of probability. See, **section 3(2)(b) of the Evidence Act, Cap. 6 RE 2019**. Furthermore, it is already a settled law that a party with heavier evidence always wins a case. The case of **Hemedi Saidi v. Mohamedi Mbilu [1984] TLR 113,** has stated the principle of law that courts has not departed from, thus:

> *"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

In the instant case, the appellant does not object on the respondent's evidence that his sold pieces of land to the respondents at different times. Later, the appellant's father died in 2002 and the appellant was appointed to administer the estates in 2003. Thereafter, the appellant did not distribute the deceased's estates on the allegation that he was still identifying them. In 2008, the appellant noticed that the deceased's land located at Kabengwe was encroached by the respondents. Since, the appellant's appointment, it took about five years before he noticed the encroachment of the deceased's land at Kabengwe.

Also, the appellant perused his father's documents and realised that his father purchased the forest in 1955 at the price of Tshs. 7,500/=. Honestly, this was a lot of money in 1955; it was possibly sufficient to purchase a big estate at Kariakoo in Dar es salaam at that time. I am honestly doubtful whether the document proving that purchase of land was genuine. Now, assuming that the document was genuine, then the appellant's land was not a clan land because the appellant's father purchased it from Evarista Kashaga. He was therefore entitled to sale it to any person without an approval of clan members. Therefore, Mr. Chamani's argument that the respondents purchased pieces of land from the appellant's father without approval from clan members has no merit, frivolous and vexatious.

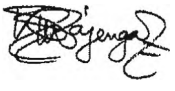
As earlier stated, the contention in this case is on the encroachment of the appellant's land. However, the respondents have been using the disputed land since 2000. The appellant's father died in 2002 and left the respondents occupying the land. Despite being appointed as the administrator of estates in 2003, the appellant never complained about the encroachment until in 2014. According to the appellant's evidence, he noticed the encroachment in 2008. However, the appellant failed to show reasons why he failed to distribute the deceased's properties since 2003. It is very doubtful whether the appellant even knew that his father had a piece of land at Kabengwe because he could have either distributed it if it was not encroached or he could have claimed it immediately after his appointment in 2003. The claim of this land seems to be an afterthought.

The counsel for the appellant further argued that the 2nd respondent did not purchase the land from the appellant's father. However, the evidence of the 2nd respondent clearly shows that he instructed DW4 to purchase the pieces of land on his behalf because he worked in Dar es salaam. DW4 testified and confirmed that he was instructed to purchase the land. All the sale agreements were approved by village leaders and witnessed by neighbours. Mr. Chamani's argument that the sale agreements were not witnessed by the 2nd respondent and neighbours of the respective areas has no merit.

In addition, Mr. Chamani argued that the sale agreements did not state the size of the land purchased the respondents. In my view, it was the appellant's obligation to prove his case rather than shifting the burden to the respondents. The appellant was supposed to summon witnesses who could prove that his father sold the land and boundaries were set at a certain point. Furthermore, the appellant was blamed for hiding the will which showed the exact size of the sold land. The appellant tried to tender the will but later withdrew it. Based on this fact which was not controverted nor denied by the appellant, the trial tribunal drew an adverse inference against the appellant's case. On their part, the respondents clearly showed their sale agreements and explained the size of the land they purchased from the appellant's father. In my view, the respondents furnished their burden of proof; it was the duty of the appellant to prove otherwise.

On the issue of time limit, I think it is the duty of every person to keep an eye on his properties and take immediate action whenever encroachment is done. On the issue of when does the time begins to run between the time of encroachment and time of knowing the encroachment. In my view, the appellant, who lived within the localities of the respondents and who was appointed to administer the estates of his father, was supposed to be watchful to





his father's estates. There is no doubt, the respondents constructed their residential houses and planted trees in the land since 2000. The appellant was appointed as an administrator in 2003 while the respondents were already in the land. If this was real the land of his father, the appellant could have noticed the encroachment earlier. In my view, time begins to run immediately after the trespasser encroaches into the land and not after noticing the encroachment. Applying the principle of law propagated by Mr. Chamani would mean that a person may occupies the land for even fifty years then a person comes to evict him on the reason that I learn about the encroachment last year. This spurious argument may open doors for unscrupulous persons like the appellant whose causes of action have been time-barred.

Furthermore, even if this case could not be dismissed on the reason that it was time-barred, the appellant's case was weaker as compared to the respondents' case. This being the first appellate court, I have considered the evidence adduced before the trial tribunal, it is lucid that the appellant's father sold the land to the respondents during his life time. For no good reasons, the appellant has engineered this dispute just as an afterthought. I have further considered the grounds of appeal and none of them was able to impact the robust decision of the trial tribunal. I hereby dismiss the appeal with costs and declare the respondents as lawful owners of the pieces of land they purchased from the

appellant's father. I further order the appellant not to disturb the respondent. It is so ordered.

**DATED** at **BUKOBA** this 11th day of June, 2021.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**11/06/2021**

**Court:**

Judgement delivered this 11th June 2021 in the presence of the appellant, respondents and the counsel for the 1st respondent, Miss Erieth Barnabas (advocate). Right of appeal explained to the parties.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**11/06/2021**