IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MUSOMA)

AT MUSOMA

MISC. LAND APPEAL NO. 13 OF 2021

(From the Decision of the District Land and Housing Tribunal in Land Appeal No. 77 of 2017)

JOSEPH R. MCHURA ..... APPELLANT

VERSUS

KAREN ABICH MCHURA ..... RESPONDENT

JUDGMENT

12/7/2021 & 29/7/2021

MKASIMONGWA, J

In the Ward Tribunal of Raranya Ward, one KAREN ABICH MCHURA (Respondent) sued JOSEPH R. MCHURA (Appellant) claiming for a 270 by 202 paces piece of land alleged the Appellant had encroached into. The matter was heard by the Tribunal a quorum of which involved seven members. In deciding the matter, the Tribunal was in the first place satisfied that the land in dispute was actually about 160 by 177 paces area. Three of the members constituted the quorum opined that the parties should equally share the land. Four other members were of the opinion that the Appellant had been on the land for more than twenty years and

that he developed it without being disturbed by the Respondent and or the members of their clan. Based on the opinion of the majority members the Ward Tribunal found the suit in favour of the Appellant. The later was therefore declared the lawful owner of the suit land. The respondent was ordered to pay Tshs. 37,500/= being costs for moving the Tribunal members to the suit land.

The Respondent was dissatisfied by the decision of the Ward Tribunal. She therefore appealed to the District Land and Housing Tribunal for Tarime (Appellate Tribunal). After it had heard the parties and gone through the evidence on record, the Appellate Tribunal found merit in the Appeal. Consequently, the Appeal was allowed and the decision of the Ward Tribunal was accordingly reversed. In deciding the Appeal the District Land and Housing Tribunal had the following to say:

> *"I have (sic) satisfied that the Appellant and her late husband started to live in the disputed land in 1986. The Respondent invaded the disputed land in 2000, after the Appellant avent to Kenya for treatment. As the Appellant started to live in the disputed land in 1986 I concur with assessors, opinion that were in the appellant (sic) favour .... I hereby allow this appeal and the judgment of Ward Tribunal is hereby vacated and I*

hereby declare the appellant the lawful owner of the disputed land".

Again, that decision did no good to the Appellant hence he preferred this Appeal challenging it. In the Petition of Appeal filed, the Appellant listed four ground as follows:

1. *That, the District Land and Housing Tribunal being the first appellate Court failed on its duty of properly re-evaluate the evidence on record as a result it wrongly reached on its findings in favour of the respondent.*
2. *That, the District Land and Housing Tribunal failed to discover that the respondent filed land case No. 5 of 2017 before Raranya Ward Tribunal while it was barred with time of limitation; the same case ought to have been dismissed outright.*
3. *That the judgment of District Land and Housing Tribunal was not a judgment at all for failure by Honorable chairman to follow the requirement of Regulations. G.N 174 Published on 27/6/2003.*

4. *That, on balance of probability there is no cogent evidence on record for the District Land and Housing Tribunal to reverse the findings of a trial Ward Tribunal of declaring the appellant as a legal owner of disputed land.*

The historical background of this matter is as that: one Mzee Mchura got married to three wives whom he respectively allocated pieces of lands. Among the wives are Paulina and Kezia. The former had a son called ABICHI who got married to the Respondent whereas Kezia is the biological mother of the Appellant. Paulina (PW3) gave the land in dispute to Abich and that the later used it along with his wife. On his demise the Respondent continued owning it. Sometime in 1995 the Appellant got married and after a year of the marriage, Kezia (DW2) gave to the Appellant a piece of land. On a certain day in 2009 when the Respondent was in Kisumu Kenya for treatment, while PW3 was working on the land owned by the Respondent, she was confronted by the Appellant who was armed with a machete blocking her from farming the land. Both the Appellant and Respondent claim ownership over the land hence the case before the Ward Tribunal.

On the date the appeal came for hearing Mr. Cosmas Tuthuru and Mr. Boniface Sariro, learned advocates appeared before me on behalf of the Appellant and Respondent, respectively. When he was invited to argue his case, Mr. Tuthuru in the first place sought to abandon the third ground of Appeal. The learned counsel argued the first ground of appeal separately whereas the second and fourth grounds were agued together.

As regards to the first ground of appeal a complain of which is to the effect that the suit filed by the Respondent before the Ward Tribunal was time barred Mr. Tuthuru submitted that the matter before the Ward Tribunal was instituted on 18/3/2017 and that going by evidence, the Appellant acquired the land in 1996. The suit was therefore instituted twenty one years after when the Appellant started living on the land which fact faulted the provisions of Item 22 of Part I of the Schedule to the Law of Limitation Act [Cap 89 R.E 2019]. As the matter before the Ward Tribunal was time barred, the District Land and Housing Tribunal ought to have declared the Appellant to be the owner of the land in dispute and accordingly the Appellant's suit should have been dismissed.

On his part, in respect of the ground and in response to his learned friend's submission Mr. Sariro contended that going by the evidence on

record the cause of action accrued in 2009 when the Appellant entered into the land and uprooted the land demarcating planted sisals. On being asked, the Appellant contended that he was just clearing the environment. The Appellant further admitted before their brother that he was wrong and promised to leave the land to the Respondent. Given these facts the principle of adverse possession does not apply into the facts this case. He said the principle was well expounded in the case of **Registered Trustees of Holy Sprit Sisters' Tanzania v. January Kamili Shayo and 139 Others**; Civil Appeal No. 193 of 2016, CAT Arusha (Unreported) where the Court again listed factors a person seeking to acquire title to land by adverse possession has to cumulatively prove. Those were not proved in this case. He asked the Court that it finds no merit in the ground of appeal and the same should accordingly be dismissed.

In a short rejoinder Mr. Tuthuru submitted that there is ample evidence on record which is to the effect that there was an invasion of the land by the Appellant and that the issue was settled. The Ward Tribunal did not find it that the Appellant had trespassed on the Respondent's land. The District Land and Housing Tribunal was therefore not justified when it

reversed the decision of the Ward Tribunal. Mr. Tuthuru prayed the court that it finds merit in the ground.

As pointed out earlier, under the first ground of appeal, the Appellant allege that the matter first brought before the Ward Tribunal was time barred. The District Land and Housing Tribunal is blamed for failure to discover that the Respondent filed the suit before the Ward Tribunal while it was barred with a time limitation. It is important to note here that, time limitations was not the plea the Appellant had in the Ward Tribunal. It was not even taken as an issue before the District Land and Housing Tribunal by the Respondent. Before the Appellate Tribunal time limitation was not an issue falling within her line of thinking. May be the Appellant was of such a view but he did not raise it before the District Land and Housing Tribunal (DLHT) for it to consider reevaluating the evidence and eventually determine on it. This may be was due to his uncertainty as to when actually the cause of action accrued as it was shown by Mr. Sariro, advocate, for the Respondent. The uncertainty is again confirmed by the record also shows, when was responding to the question put to him by the Ward Tribunal, the appellant was recorded saying that the dispute arose in 2016.

Since the Appellant did not invite the District Land and Housing Tribunal (DLHT) to consider whether or not the matter was timely instituted in the Ward Tribunal, he cannot successfully accuse it that it failed to consider the issue. In this Court, I find the issue has been raised as an afterthought. Since the issue was not first raised, considered and determined by the first appellate Court it is not within the realm of this Court to consider and determine it. Secondly, even if it can be taken to be within the powers of this Court to deal with the issue at this stage the Applicant's answer to the Tribunal that the dispute arose in 2016 defeats the ground of appeal. The first ground of appeal is therefore dismissed.

As regard to the second and fourth grounds of appeal Mr. Tuthuru submitted that the District Land and Housing Tribunal did not properly evaluate the evidence on record. According to Mr. Tuthuru the evidence on record is to the effect that the parties each has his/her respective piece of land which share a common boundary marked with sisal plants. The Appellant got the land from his mother. The Respondent stated in evidence before the Ward Tribunal that she got the land in 1986 and that the Appellant has not gone beyond the boundary and that she peacefully used the land until 2009 when this dispute ensued. It is when the Appellant

erected a house on his land. He submitted that had the Appellate Tribunal Chairman properly evaluated this evidence, he could not have reached at the conclusion he had made in the matter. In his response to the submission Mr. Sariro submitted that the complaint under the third and fourth grounds of appeal is that the Appellate Tribunal did not evaluate the evidence in the matter. Mr. Sariro contended that the complaint was not justified. He said, according to the contested judgment, the same speaks of the evidence, submissions and reasoning. As such the evidence was analysed and the complainant is therefore baseless. He prayed the Appeal to be dismissed.

As it was shown out earlier that in its decision the District Land and Housing Tribunal (DLHT) found it being a proved fact that the Respondent had been in occupation of the land from 1986. This actually based on her evidence supported by Elias Mchura (PW2), Paulina Mchura (PW3) and Nestory Mchura (PW3). PW2 and PW4 are the brothers to the Appellant, the former being the elder one. Save for DW2, the Appellant's own mother DW3 was a stranger to the clan/family which clan seems to have its own ways in which to solve disputes that arise within it. PW2 and PW3 in my views had no interest of their own on the land to preserve when one

compares to the PW2 and DW2. Gauging the matter from the evidence I am of the view that the District Land and Housing Tribunal (DLHT) was right when it found that the land in dispute actually is that the Respondent was given by her mother in law, sometime in 1986. As such, the Appellant could not have claimed for it purporting that he was given the same by his own mother.

Indeed, on the land there are graves of the Appellant's two sons among others. The fact that the Appellant had buried his sons on the land and that he has developed it does justify him to be the owner of that land. This is because the Respondent was heard saying.

> *"Sikudai vitu vilivyopo kwenye mji wako bali eneo la shamba ulomolima mihogo na mahindi. Kuhusu makaburi familia nzima ya mzee Mchura ilitenga eneo hilo ili liwe Kaburi kwani hata mtoto wa mdogo wako amezikwa hapo. Eneo hili halipo katikati ya shamba bali pembeni. Makaburi yaliyomo humo yamezikwa mwaka 2012 ya pili 2015 ya tatu ulimzika nyumbani kwako"*

The evidence on record in my view even if it were true that was not analyzed by the District Land and Housing Tribunal (DLHT), still justified the decision.

As the complaint in this appeal that the matter before the Ward Tribunal was not timely instituted is devoid of any merit and since the evidence on record justified the decision, I find no merit in this Appeal. The same is therefore dismissed with costs.

DATED at **MUSOMA** this 29th day of July, 2021

E. J. Mkasimongwa

JUDGE

29/7/2021