THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 24 OF 2020

(From: Mbeya District Land and Housing Tribunal Appeal No. 150 of 2019. Before Hon. T. Munzerere– Chairman. Dated 23rd June 2020, Originated from Igava Ward Tribunal Land Dispute Case. 01/2019, Dated 31st October 2019)

HAMISI DAUD MLWILO..... APPELLANT

VERSUS

IMANI BAHARIA ..... RESPONDENT

JUDGMENT

Date of last order: 27/05/2021

Date of Judgment: 12/8/2021

NDUNGURU, J.

This appeal originates from a dispute over ownership of a farm filed by the appellant Hamisi Daud Mlwilo challenging the decision of the District Land and Housing Tribunal for Mbeya (DLHT) which allowed the appeal of

the respondent Imani Baharia by declaring him a lawful owner of the land in dispute. At the ward tribunal for Igava the appellant was declared the owner of the suit land.

When the appeal was called for hearing, Mr. Salvatory Twamalenke, learned advocate appeared for the appellant whereas Mr. Shitambala learned advocate appeared for the respondent.

Upon request by the parties to dispose the appeal by way of written submission, this court allowed the appeal be argued by way of written submission and they complied with filing schedule.

Submitting in support of the appeal, Mr. Salvatory Twamalenke in brief summary stated that, the original land dispute case No. 01 of 2019 was filed by the appellant one Hamisi Daud Mlwilo at the ward tribunal of Igava within Mbarali district against the respondent one Iman Baharia on land trespass of a farm of 6 acres of land on 09/05/2019 whereby the matter was tried in favour the appellant who was declared the lawful owner of the disputed land.

He further submitted that the respondent being aggrieved with the victory of the appellant preferred an appeal to the District Land and

Housing Tribunal for Mbeya containing 6 grounds of appeal and among the ground which he relied was ground no. 6 which stated that "the ward tribunal erred in law and fact for entertaining this matter which was time barred.

He added that the District Land and Housing Tribunal overturned the decision of the Igava ward tribunal and declared the respondent as the owner of the disputed land by relying on ground number 6 that the matter was time barred and proceeded to declare the respondent as the lawful owner of the suit land, while the matter was not so proved.

The appellant being aggrieved by the entire decision of DLHT for Mbeya in the land Appeal No. 150 of 2019, henceforth preferred four (4) grounds of appeal to this Court as hereunder listed for easy reference;

1. *That the Hon. Chairman of the DLHT erred in law and fact to depart from the assessors' opinion who opined in favour of the Appellant without assigning reasons for the departure.*
2. *That the Hon. Chairman of the DLHT erred in law and fact to hold that the matter was time barred on account that the respondent has used the disputed land for long time while not so proved.*

3. *That the Hon. Chairman of the DLHT erred in law and fact to declare the Respondent as the owner of the suit land while he failed to prove at the ward tribunal on ownership of the suit land compared to the Appellant who proved to own the suit land.*
4. *That the Hon. Chairman of the DLHT erred in law and fact to overturn the decision of the Ward Tribunal without assigning good reasons for his decision in his judgment which is vague, ambiguous and un understood which ended in erroneous on the side of the Appellant.*

He then prayed for this court to adopt all his grounds of appeal to be part of his submission in chief.

With regard the first ground of appeal he submitted that the Hon. Chairman of the DLHT erred in law and fact to depart from the assessors' opinion who opined in favour of the appellant without assigning reasons for the departure.

He pinpointed at page 5 of the DLHT judgment which shows the opinion of assessors in favour of the appellant herein and he quoted **"Mimi na huyo na shamba lenye mgogoro ni mali ya Daudi Mlwilo" and that "Nashauri eneo lenye mgogoro apewe Hamisi Mlwilo"** the Hon Chairman disagreed to the opinions of both assessors of the tribunal. He

saw no reasons advanced by Hon. Chairman to ignore the opinion of both assessors who opined in favour of the appellant.

He argued that the Chairman of the DLHT offended **Section 23(2) and 24** of Land Disputes Courts Act (LADCA) No. 2 of 2002 R.E 2019 as insisted in the case of **Nuru Maguru vrs Kenani Ngogo, Misc. Land Appeal No. 35 of 2019 (Ureported) UTAMWA, J** on pages 4, 5,and 7 where it was held that

> *"The point of on assessors' opinion is very crucial. It is more so because it touches the competence of the proceedings before the DLHT and its jurisdiction. The major issue related to the legal point on the assessors' opinion is whether or not the chairman of the DLHT considered the opinion of the assessors sitting with him in accordance with the law and gave reasons for his departure therefrom. Section 24 requires the chairman of the DLHT to take into account the opinion of assessors which do not bind him, but if he differs from them, he is enjoined to give reason for his departure. As to Section 23(2), it obliges the chairman to require the assessors to give out their opinion before he reaches the judgment. .... In the case at hand, I do not think that the chairman properly complied with section 23(2) of the LADCA. Indeed, the impugned judgment shows that, the opinion was referred to by the chairman in the impugned*

judgment and reason for his departure. In my view, the course taken by the chairman did not comply with the law. The finding I have just made is enough to dispose the entire appeal. I nullify the proceedings of the DLHT ..."

Again, the same position was observed in the case of ***James Kipokile* vs *Enos Kipokile, Land Appeal No.36 of 2016, High Court of Tanzania at Mbeya Mambi-J (Unreported)*** *at pg. 5 of the judgment insisted that the Chairman is required to assign or give reasons if he does not want to take into account the opinion of assessors.*

A well the law under **Section 24 of the Land Disputes Courts Act CAP 216** [Revised Edition 2019] clearly states that;

"In reaching decisions the chairman shall takes into account the opinion of the assessors but shall not be bound by it, except that the chairman shall in the judgment give reasons for differing with such opinion."

He added that in the case hand the Chairman did not give reasons at all for his departure to the opinion of assessors.

Also, the Court of Appeal of Tanzania in the case of **CHADIEL MDUMA versus DENIS MUSHI CIVIL APPEAL NO. 41 OF 2013 (Unreported) at pg 3 paragraph 4** held that

"We entirely agree with both learned counsel that failure to take opinion of assessors is fundamental irregularity which goes to the root of a trial"

In that regard, he prayed for this Court to consider that the tribunal made a serious error which vitiates its judgment to be unfair and unjustifiable in law, for the failure of the Chairman to assign reasons for differing with opinion of assessors.

He prayed to the court to allow this appeal, by declaring the appellant as a lawful owner of the land in dispute and the decision of the District Land and Housing Tribunal to be quashed.

As regards the second ground of appeal he submitted that the Hon. Chairman of the DLHT erred in law and fact to hold that the matter was time barred on account that the respondent has used the disputed land for long time while not so proved.

He further submitted that the suit land had been under the occupancy of the appellant's father called Ibrahimu Mlwilo since 1963 – 1964 whereby he occupied 103 acres of land for agriculture and pastoralism purpose, the appellant's father continued to use the suit land

until 1999 when the village government requested him to use the suit land for conserving forest (Matumizi bora ya Ardhi) under his ownership.

Therefore, the village conserved a forest prior the agreement made with the appellant's father. The land remained to be Mlwilo's land however; he used to conserve forest for the betterment of the village. As regard any change of use the land was to be returned back to the appellant as no any compensation was paid to the appellant regarding that land. Thus, he said the allegation that the respondent used the land since 1999 is not true. It would be total trespass and the law of limitation cannot apply.

As regard the principle of adverse possession. He submitted that the principle does not operate in that way. He argued that the owner of the suit land is known and there are clear terms of agreement entered by the appellant's father with the village on borrowing the appellant's land for land management use only and not to allow trespassers to invade the land and use it for agriculture or pastoralism apart from the owner who is the appellant now. He was of the view that the appellant in the Ward tribunal proceedings has stated well how the suit land has been in their occupancy and for quite long time how they used it and how the village used to borrow it for land management use only.

He insisted that the concept of long use of land (adverse possession) cannot be invoked if there was interruption on the use of the suit land and owner of the suit land is known as reflected in the proceedings of the Igava Ward tribunal. He argued that there is a series of events which shows that the appellant has been in control of the land in dispute under the umbrella or shield of Village land management use of forest. The appellant came to realize trespass made by the respondent on 2019, that is why he took steps of instituting a land suit in the Ward tribunal for Igava against the trespasser and he successfully recovered his land. However, he said prior to 2019 the appellant has made necessary effort to make sure the land is not invaded. The proceedings show that in a year 2016-2-17, 2017 – 2018 the appellant used to remove other trespassers on their lawful land.

Mr Twamalenke continued to submit that the appellant in the Ward tribunal managed to bring two witnesses who proved that the suit land belongs to the appellant (Mlwilo's) family and those witnesses were Ashiri Ibrahim Mlwilo and Twaha. A, Nguluvala. He submitted that reading the testimonies of these witnesses it is undisputed that the

appellant is the owner of the suit land while the respondent remains a trespasser.

He further submitted that the suit land has been in occupancy in the appellant's father one Mzee Ibrahim Mlwilo since 1964 up to 1st February 2010 when he passed away and the land was succeeded by his family members under the administration of estate of the appellant one Hamis Ibrahim Mlwilo.

As regard the third ground of appeal learned counsel submitted that the Chairman of the DLHT erred in law and fact to declare the respondent the owner of the suit land while he failed to prove that at the ward tribunal on ownership of the suit land.

He added that the Chairman of the District land and Housing Tribunal failed to analyze properly the facts posed before the trial ward tribunal which reflected clearly that the suit land belongs to the appellant and the appellant managed to prove so compared to the respondent who failed to prove on ownership to that land. He said the chairman reliance on the doctrine of adverse possession on the long use of the land by the

respondent went against the testimony and facts of the case as laid down before the Ward tribunal by the appellant and his witnesses.

He said, in short, the respondent did not occupy the suit land for such duration rather he is a trespasser and the appellant came to realize the trespass of the respondent on 2019, and immediately he took steps of suing him in the Ward tribunal for trespass and the Ward tribunal declared him the lawful owner as provided in the judgment of the Ward tribunal.

Mr. Twamalenke submitting as regards the fourth ground of appeal argued that the judgment of the DLHT is vague and not well composed in a sense of analyzing the grounds of appeal posed by the respondent on the appeal from the ward tribunal. He further argued that it only relied on ground number 6.

In concluding, he prayed the court to allow the appeal by restoring the decision of the Ward Tribunal by quashing the decision of the District Land and Housing Tribunal with costs.

In rebuttal, Mr. Shitambala learned advocate submitted that, taking into consideration the first ground of appeal raised by the counsel for the appellant is clearly stipulated in the law that a trial chairman of the

tribunal is bound to take assessors opinions, and if departures from the assessors' opinions should state the reasons for the departure. He cited **Section 24 of the land Disputes Court Cap 216** R.E 2019 which provides that;

> *"In reaching decisions the chairman shall take into account the opinion of the Assessors but shall not be bound by it, except that the chairman shall in the judgment gives reasons for differing with such opinion".*

As regards this case at hand he submitted that this ground of appeal is baseless because the trial Chairman when differing with assessors' opinions gave the reasons for not taking into consideration such assessors' opinion, of which he said that the application entertained by Igava Ward Tribunal was time barred.

On the second ground of appeal, he argued that it is the requirement of the law that, one who alleges must prove the allegation, whereby in the civil matters the complainant has to prove the case by the preponderance of probability he cited **Section 3(2)(b) of the Law of Evidence Act Cap 6 R.E. 2019.**

Responding further he said in this case at hand, the trial chairman ruled in favour of the respondent because not only the respondent has proved the case before the tribunal, that he stayed in the disputed land since 19999, where the dispute arose in 2019. He added, in simple calculation the respondent has stayed for 20 years in the disputed land without any interference.

Mr Shitambala went on submitting that the trial tribunal erred nothing in his decision since the matter was time barred as it is seen in the records of the proceedings of the ward tribunal. The provision of item 22 of the schedule of the law of limitation Act provides clearly that the limitation for accrue of right to land is twelve (12) years, hence the matter was time barred.

On third ground of appeal, Mr. Shitambala submitted that the trial court did so to see if justice done in the administration of justice. He added that the decision of DLHT of Mbeya differed with the decision of Igava Ward Tribunal on the basis of time limitation. He said this was proved by both parties that the respondent was in possession of the disputed land since 1999 up to 2019 when the dispute arose. He cemented his argument by adding that the trial DLHT decision was proper because

the time for ownership of land is 12 years as per law of limitation that is why the DLHT departed from the decision of Igava Ward tribunal.

He continued to submit on ground four of appeal that the counsel for the appellant mislead himself because there is no doubt that the trial chairman of the DLHT of Mbeya grounded his decision based on limitation of time.

He added that this ground of appeal is baseless and intends to waste the time of the court. He finally prayed the appeal be dismissed with costs.

In rejoinder Mr. Twamalenke reiterated what he has submitted in the submission in chief. He added that the respondent has failed to counter his submission in chief for the failure of the DLHT Chairman to assign reasons for his departure to consider the assessors' opinion.

Finally, he prayed this appeal be allowed by restoring the decision of the Ward Tribunal of Igava by quashing the decision of the District Land and Housing Tribunal with costs.

Having read in detail the written submissions filed by the parties and the court records starting from the records of the Ward tribunal for

Igava, the records of DLHT for Mbeya, the issue calling for determinations are;

(i) Whether the DLHT chairman disregarded the assessors' opinion.
(ii) Whether the Suit in the trial Ward Tribunal was time barred.
(iii) Who is the rightful owner of the suit land
(iv) Any other relief(s) that this Honorable Court might deem just and fit to grant.

On the first issue as to whether the DLHT chairman disregarded the assessors' opinion, in answering this issue I perused the DLHT records and find the assessors' opinion opined in favour of the appellant that the suit land belongs to the appellant. They said the farm dispute is the property of Mlwilo and the other assessor opined that the land in disputes be given to Hamisi Mlwilo. Then, I come to see whether the DLHT chairman disregarded their opinion intentionally?

Passing through the decision Hon. Chairman gave reasons as to why he did not consider the assessors' opinion since his mind was centered on points of law and not facts as to who is the original owner. He applied

the law of limitation to decide that the matter was time barred to be entertained by the ward tribunal.

So, the test here is to see whether the DLHT Chairman did assign reasons for his departure from the assessors' opinion as the law dictates under Section 24 of the Land Disputes Court Act, Cap 216 R.E 2019. I found that the DLHT chairman did comply with the law on the issue of assessors' opinion consideration.

With regards the second issue as to whether the suit in the Ward Tribunal was time barred. When I read clearly the testimony of the appellant and his witnesses in the Ward tribunal still I find that the suit land was under the occupancy of the appellant's father one Ibrahimu Mlwilo since 1963s whereby he occupied 103 acres of land for agriculture and pastoralism purpose. The appellant's father continued to use the suit land until the year 1999 when the village government requested the appellant's land to be used for forest conservation (the land use management program) while under his ownership. So, the village conserved a forest prior to the agreement made with the appellant's father that the land will remain to be Mlwilo's land, however to be used for keeping forest for the betterment of the village. With the

condition that any change of use the land is be returned back to the appellant since no any compensation was paid to the appellant's father regarding the acquisition of land by the village.

Therefore, the argument that the respondent had used the suit land since 1999 does not entitle a better title and cannot be blessed by the law of limitation Act as observed by the Chairman of DLHT for Mbeya that it was a total misconception of the law, since the ownership of land did not pass to the Village to enable the respondent to acquire better title over land vide his occupation of land through the village.

Still, am in a strong view that the adverse possession of land does not come into place if the owner of the disputed land is known and in control of the suit land.

It is in the records of the ward tribunal proceedings and judgment that it has been admitted by the Village Chairman of Ikanutwa that the village men did consent that the suit land be returned to the original occupier after the village Council failed to pay compensation to Ibrahim Mlwilo of Tsh. 70 Million Tanzania Shillings for acquisition of land by the village.

The concept of long use of land **(adverse possession)** cannot be invoked if there was interruption on the use of the suit land and if there is known owner of the suit land as it is reflected in the proceedings of the Igava Ward tribunal whereby there is a series of events which shows that the appellant has been in control of the land in dispute under the umbrella or shield of Village land management use of forest and not to diverge the land of the appellant to any trespasser as trespassed by the respondent whereby the appellant came to realize on the trespass made by the respondent on 2019, that is why he took steps of instituting land suit in the Ward tribunal for Igava against the trespasser and he successfully recovered his land. But prior to 2019 the appellant has made a necessary effort to make sure the land is not invaded. In the year 17-2-2016, 2017 – 2018 the appellant used to remove other trespassers on their lawful land.

The witnesses on the side of the appellant managed to prove that the suit land belongs to the appellant (Mlwilo's) family. Those witnesses were Ashiri Ibrahim Mlwilo and Twaha. A, Nguluvala, when I read their testimonies prove that the appellant is the owner of the suit land and the respondent remains a trespasser. The suit land continued

to be in the occupancy of the appellant's father Ibrahim Mlwilo since 1963s up to 1st February 2010 when he passed away and the land was succeeded by his family members under the administration of estate of the appellant one Hamis Ibrahim Mlwilo.

The court of Appeal of Tanzania discussing the **applicability of adverse possession doctrine** in occupancy of land versus time limitation to recover land in the case of **Yeriko Mgege vs Joseph Amos Mhiche, Civil Appeal no. 137 of 2017 (CAT) at Iringa (Unreported)** at pg. 13- 16, held that

> *"... a trespasser or an invitee cannot claim that acquired that land by long and undisturbed occupation. We are certain that he misconceived the law when he argued that a trespasser acquired land on which he trespassed after twelve years of occupancy. To the contrary, the law is settled in this jurisdiction that no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made to the land on which he was invited or trespassed."* ...

Likewise, I grabbed with an akin argument in **The Hon. Attorney General. vrs. Mwahezi Mohamed (**As Administrator of the Estate of the late Dolly Maria Eustace**) and three others, Civil appeal**

No. 391 of 2019 – [2020] TZCA 27 at www.tanzlii.org in which an appellant claimed adverse possession only on account that he had been in occupation of the land in dispute for over forty years. In determining that issue I relied on the previous decision in the case of **Registered Trustees of Holy Spirit Sisters Tanzania.v. January Kamili Shayo and 136 Others, Civil Appeal no. 193 of 2016 – [2018] TZCA 32** at www.tanzlii.org with the holding that the assumption was incorrect. At p. 24 of **Registered Trustees of Holy Spirit Sisters Tanzania. vrs. January Kamili Shayo and 136 Others,** (Supra) i observed:

> *"... it [cannot] be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession. Possession and occupation of the land for a considerable period do not, in themselves, automatically give rise to a claim of adverse possession"*

Similarly, in the case of of **Maigu .E. M. Magenda .vrs. Arbogast Maugo Magenda** (supra), i observed at p. 13 of the typed judgment that;

> *"We do not think continuous use of land as an invitee or trespasser or building a permanent house on another person's land or even*

paying land rent to the City Council of Mwanza in his own name would amount to assumption of ownership of the disputed land ... cannot pass ownership of the disputed land to the trespasser or invitee"

Basing on the foregoing decisions, am of the very settled mind that an invitee or trespasser to the land could not have owned the said land to the exclusion of the owner. As well, he could not claim adverse possession simply he stayed in the disputed land for seventeen of undisturbed years. Still, he is a trespasser and his status remains so. The law of Limitation cannot, therefore, be applicable in the circumstances of this case.

From this juncture, I find the DLHT Chairman applied wrongly the concept of law of limitation to decide that the suit at the ward tribunal was time barred, henceforth; I find that the suit at the ward tribunal was proper entertained and rightly decided. Since I have resolved the second issue as explained above, I see no need to labour much to the remaining issues. I hereby nullify the proceedings and judgment of the DLHT and restore the decision of the ward tribunal. The appeal is allowed with costs.

It is so ordered.

D.B. NDUNGURU
12/8/2021
JUDGE

Date: 20/08/2021

Coram: P. D. Ntumo – PRM, Ag. DR

Appellant: Present

For the Appellant: Mr. Salvatory Twamarenke - Advocate

Respondent: Present

For the Respondent: Absent

B/C: Akida Mzee

Court: Judgment delivered in chambers in the presence of the parties and Mr. Salvatory Twamarenke, learned counsel for the appellant this 20th day of August, 2021.

Right of Appeal explained.

P. D. NTUMO – PRM
Ag. DEPUTY REGISTRAR
20/08/2021

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA