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

LAND CASE APPEAL NO. 113 OF 2020
(*Originating from District Land and Housing Tribunal of Bukoba in Application No. 67/2014*)

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....APPELLANT
VERSUS
HELLEN BYERA NESTORY.....RESPONDENT

JUDGMENT

06th August & 13th August 2021

Kilekamajenga, J.

In this case it is alleged that, in 1990, the appellant, Tanzania Electronic Supply Company Ltd, was involved in the power supply project that involved connecting power from Mtukula (Uganda) to Bukoba. In order to effectively implement the project, land was needed for fixing poles all the way from Mtukula. Also, the project needed land for setting-up a power sub-station, keep and install equipment, construct workers quarters and construct a petrol station. The appellant identified appropriate places and through the local government of Bukoba, the areas within Bukoba Municipality at Kibeta were marked as appropriate places for the project. The Bukoba Municipal Council informed the owners of the identified places about the project. The government conducted an evaluation and compensated owners accordingly.

The appellant surveyed the area where Plot No. 1 – 3 belonged to the appellant and plot No. 4 – 6 belonged to other neighbours who were accommodated in the appellant's survey process. However, plot No. 4 and 5 which belonged to the respondent's mother. Moreover, the survey and compensation was done in 1991 in the presence of the respondent's mother called Suzana Mukagilage Jonathan.

In 2014, the respondent, who was the administrator of the estate of the late Suzana Mukagilage Jonathan, sued the appellant at the District Land Housing Tribunal at Bukoba alleging that her mother was the lawful owner of plot No. 3 under deemed right of occupy. Her mother purchased the land in 1978 from Adela Jacob. She further alleged that the appellant leased the land for temporary use to implement the project in 1994. The respondent alleged that, after the project, the appellant unfairly encroached into the land. In 2013, the respondent realised that the appellant had illegally surveyed the land.

At the trial tribunal, the case was decided in favour of the respondent. Being unhappy with the decision, the appellant approached this Court for justice. The appellant advanced five grounds of appeal thus:

1. *That the trial chairman erred in facts and law to entertain a land dispute which was time barred for recovery and compensation;*

2. *That the trial chairman erred in facts and law when entered judgment and decree in favour of respondent by relying on unauthentic land sale agreement and contradicting hearsay evidence on lease agreement and ownership of disputed land without any corroboration to the same;*

3. *That the trial chairman erred in facts and law by declaring that the respondent is the owner of plot No. 3 by disregarding the evidence adduced by witnesses of both parties on who were owners of land in dispute and process employed before the same was acquired by the appellant through compensation;*

4. *That the trial chairman erred in fact and law when refused the appellant to tender vital secondary documentary evidence while all procedure of tendering the same was observed;*

5. *That the trial chairman erred in facts and law by disregarding the assessors' opinions without advancing reasons for that departure.*

The appeal was finally fixed for hearing, the appellant was represented by the learned advocate, Mr. Laurian Hakimu Lyarukuka assisted by the learned advocate, Ms. Theresia Masangya whereas the respondent was absent but represented by the learned advocate, Mr. Assey. In the oral submission, Mr.

Lyarukuka informed the Court that, this matter was timed-barred when filed at the trial tribunal. He narrated the background of the dispute arguing that the appellant occupied the land since 1991 whilst the case was filed in 2014.

On second ground, the counsel for the appellant impugned the sale agreement (exhibit P2) which alleged to give title to the respondent's mother in 1978. According to the alleged sale agreement, only one witness signed and the alleged seller did not sign it. Also, the agreement does not show the boundaries of the land. Also, none of the witnesses named in the sale agreement was called to testify at the trial tribunal. On the third ground, the pleadings show that there were other owners on the land before the appellant owned it. PW1 and PW2 also confirmed that the owners of the land were compensated but respondent's mother remained on her plot.

On the 4th ground, the trial tribunal unfairly rejected admission of the letter which was written by the respondent. In the letter, the respondent requested for the land but the same letter does not show that the land belonged to her. Furthermore, the trial tribunal failed to admit a letter written by the appellant in response to the respondent's letter while the appellant gave notice of intention to tender the photocopy. The counsel for the appellant further blamed the trial tribunal for failing to admit the letter written by the respondent to the land office

at Bukoba that applied for the letter of offer on plot No. 1-3 while the original letter was in the hands of the land office at Bukoba.

On the 5th ground, the counsel for the appellant argued that, the trial chairman did not give reasons for departing from assessors' opinions; while the two assessors opined in favour of the appellant. Therefore, the trial chairman contravened section 24 of the Land Disputes Courts Act, which requires the chairman to give reasons for departing from the assessors' opinion. He finally urged the Court to set aside the decision of the District Land and Housing Tribunal with costs.

On the other hand, the counsel for the respondent argued that the disputed land was used by Saldemi Consultant in 1990. He admitted that, the appellant compensated some other persons but ended-up surveying the land owned by the respondent's mother. It is true that Saldemi Consultant left the land in 1995 but the respondent knew about the invasion of the land in 2013. He argued further that, from 1995 when Saldemi Consultant left, the appellant used the land temporarily. He averred that the respondent's mother bought the land in 1978. When the respondent discovered the encroachment in 2013, she wrote a letter to the appellant on 06/08/2013 which was immediately answered by the appellant. The counsel for the respondent urged the Court to consider the letter because it was admitted during the trial.

On the second ground, the respondent did not summon the witnesses that appear on the sale agreement because all of them had died. However, the sale agreement was not disputed during the trial. He argued that, the appellant was just an invitee and later claimed ownership of the land. Mr. Assey was of the view that the appellant must show root of title. On the respondent's part, the sale agreement was sufficient to prove ownership to the respondent's mother.

On the 3rd ground, the counsel submitted that the respondent is claiming interest over the land as an administrator of estate of her mother. He insisted that, the appellant requested the land for temporary use and later surveyed it. When responding on the 4th ground, Mr. Assey argued that, the respondent's letter was rejected because the appellant tendered a copy instead of the original. On the 5th ground, Mr. Assey argued that the assessors opined in favour of the respondent and the trial tribunal had no reason to depart from such opinions. The counsel was of the view that the respondent's case was proved and the decision of the trial tribunal was correct.

In the rejoinder, Mr. Hakimu argued that the respondent's letter, which was not in dispute, show the time when the cause of action arose. Generally, the respondent's case was time-barred. He further impugned the sale agreement for not being signed by the witnesses. Also, the sale agreement does not indicate

the boundaries and neighbours of the land. Mr. Hakimu further insisted that the appellant compensated the owners of the land and the chairman failed to give reasons for departing from the assessors' opinion.

After considering the submissions from the learned counsels and the grounds of appeal advanced by the appellant, there three issues that attracted my attention in this appeal. **First**, on the 5th ground, the counsel for the appellant argued that, the trial chairman erred in fact and law by disregarding the assessors opinions without advancing reasons for the depart. At this point, I am moved to make a deeper analysis on the rationale of involving assessors at the District Land and Housing Tribunal. The law requires the chairman to sit with not less than two assessors. The presence of the chairman alone does not constitute the quorum of the tribunal. **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019** provide thus:

> *"23 (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors; and*
>
> *(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment".*

The above provision of the law is further emphasized in **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** thus:

"19 (1) The tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;

(2) Notwithstanding sub – regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give opinion in Kiswahili".

Furthermore, the chairman is obliged to consider the assessors' opinions, though, he is not bound to follow the opinions if he has reasons to depart from. However, he/she must give reasons for the departure as it is provided under **section 24 of the Land Disputes Courts** Act thus:

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

In the instant case, the issue of assessors' opinion prompted my further perusal of the proceedings of the trial tribunal. What the record shows, is a bit shocking. After the defence closed its case, the chairman ordered parties to file submissions within 14 days and the case was scheduled for judgment. The record of the trial tribunal does not show whether the assessors were invited to give their opinion. However, upon reading the judgment, assessors' opinions feature and the assessors seemed to opine in favour of the respondent.

As long as the record of the trial tribunal does not indicate/show the opinion of assessors, it is not clear when and how such opinions landed in the judgment. As a matter of law and procedure, after hearing of the case, the chairman is legally bound to invite assessors for opinion. Such opinion must be read in the presence of the parties and the chairman must record such opinion in the proceedings. Failure to do so renders the whole proceedings a nullity because, if the record does not show the assessors' opinions, it is as good as the case was heard without assessors. The Court of Appeal of Tanzania was confronted with a similar irregularity in the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble** Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported) where Hon. Kerefu, J.A. observed *inter alia* that:

> *"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence* of the parties before the said judgment was composed".

Furthermore, a similar situation occurred in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili,** Civil Appeal No. 154 of 2015 (unreported) and the Court of Appeal of Tanzania had the following to say:

> *"Therefore, in our own considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."*

Similarly, in the land mark case of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported). The Court of Appeal of Tanzania reiterated the above stance of the law. In that case Hon. Mugasha, JA further insisted that:

> *"...Such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict."*

The Court of Appeal further stated that:

> *"...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinions before the determination of the dispute. As such,* ***their opinion must be on record."*** (emphasis added).

See also, the cases **of Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil appeal No. 286 of 2017, CAT at Mbeya (unreported); **General Manager Kiwengwa Stand Hotel v. Abdallah Said Mussa**, Civil Appeal No. 13 of 2012; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali,** Civil Appeal No. 70 of 2017.

Based on the directions given in the above cases, and for the purposes of giving guidance to the District Land and Housing Tribunal, after the closure of the defence case, the chairman must schedule the case for assessor's opinion. On the date fixed for assessors' opinion, the proceedings, for instance, should read as follows:

> *Date: 10th August 2021*
> *Coram: S. J. Mashaka – Chairman*
> *T/c: Magoma*
> *Members: T. J. Kashisha and J. N. Ndoma*
> *Applicant: Present in person*
> *Respondent: Present in person*
>
> ***Tribunal:*** *The case is coming for assessors' opinion.*
> ***Applicant:*** *I m ready for the opinion*
> ***Respondent:*** *I am ready too.*

Assessors' opinions:

1st assessor – T. J. Kashisha:

Maoni yangu ni kwamba.....

.....

2nd assessor – J. N. Ndoma:

Katika kesi hii maoni yangu.....

.....

Tribunal:

Assessors' opinion read before the Tribunal in the presence of the parties.

Order: *Judgment on 20th August, 2021*

Sgd: S. J. Mashaka
Chairman
10th August, 2021

Thereafter, the chairman may compose the judgment and take into account the assessor's opinions. In the case at hand, as already stated, the proceedings do not show whether the chairman solicited opinions from the assessors. Though, the opinion feature in the judgment, the record of the tribunal does not tell so. Under the law, it is as good as, assessors were not fully involved. This fault alone is sufficient to nullify the proceedings of the trial tribunal. But, for the interest of

justice and clarity in this case and this Court, being the Court of justice, I wish to address two more points before resting the discussion.

Second, upon the perusal of the Court file, it is, without doubt that, on 06th August 2013, the respondent wrote a letter to the appellant. The letter is appended to the respondent's application. The same is also listed as one of the documents to be relied on. For that reason, a party is always bond by his/her own pleadings. Furthermore, when the respondent's counsel appeared before this Court, he admitted and further confirmed that the respondent wrote the said letter. I was particularly drawn to the contents of the letter, especially paragraph 4 and 5 which are worthy reproduction thus:

> *4. Mimi sasa nimerudi nyumbani tangu Novemba 2012 nikiwa mstaafu wa ADP. Nimetulia hapa kijijini nikimtunza mama yangu ambaye hivi sasa ana umri wa miaka 85. Wakati huo nimeangalia kwamba* ***kwa miaka 20 na zaidi*** *TANESO inatumia ardhi iliyochukuliwa kwa wazazi wangu "KUWEKEZA NGUZO TU" na kukata majani humo kila msimu wake kila mwaka. Kitu kingine nimeangalia ni kwamba Saldemi walipanda "PINE TREES" pote na palipozungushiwa na fence ambayo hivi sasa ni mikubwa na mizuri kimazingira.*
>
> *5. Nimejikuta nafikiria how "THE PIECE OF LAND IN QUESTION WHICH ON THE SURVEY MAP OF PLOT NO. 3 ... COULD BE BEST UTILIZED IF WAS RETURNED TO THE ORIGINAL OWNERS. I WOULD WISH TO DEVELOP IT FOR THE BENEFIT OF OUR COMMUNITY NA WAZALENDO WAKE. TANESCO AS A COMPANY has no real attachment nor development*

*plans for our local community hence the use of that land for over **20 years** as storage grounds for the wooden treated electric poles. **TANESCO has more land spread over on plot 3** and more space which could still be put to the same use.*

*6. MY VISION FOR THE NEAR FURTURE IS TO ESTABLISH A DAY CARE CENTRE TO CATER FOR YOUNG CHILDREN ...Kwa sababu hiyo naleta **ombi** kwa waraka huu kuomba TANESCO kurudisha ardhi **iliyokuwa ya wazazi wangu kabla ya Marchi 1992** ili mimi niweze kujenga na kuendeleza mazingira ya watoto wadogo..."* (emphasis added).

There are two things gleaned from the above contents of the letter. **One**, the respondent acknowledged that the appellant occupied and used the same land for over 20 years. Under the law of limitation, she is barred from filing a suit for the recovery of the land. The period of limitation to recover land is 12 years in terms of **section 3 (1) of the Law of Limitation Act, Cap. 89, RE 2019**, read together with Part I item 22 of the schedule of the same Act.

Even by invoking the doctrine of adverse possession, the respondent has no right to recover the land that has been in occupation by the appellant for over 20 years. This principle of the law was stated in the case of **Bhoke Kitang'ita v. Makuru Mahemba,** Civil Appeal No. 222 of 2017 CAT at Mwanza (unreported), where the Court of Appeal of Tanzania stated that:

"It is a settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise hi right to

recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession."

In the above case, the Court of Appeal adopted the approach and stance of law developed in a number of cases including the cases of **Moses v. Lovegrove** [1952] 2 QB 533 and **Hughes v. Griffin** [1969] 1 All E R 460, where it was stated that:

"[ON] the whole, a person seeking to acquire title to the land by adverse possession had to cumulatively prove the following:

a) That there had been absence of possession by the true owner through abandonment
b) That the adverse possessor had been in actual possession of the piece of land;
c) That the adverse possessor had no colour of right to be there other than his entry and occupation
d) That the adverse possessor openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;
e) That there was a sufficient animus to dispossess and an animo possidendi
f) That the statutory period, in this case ***twelve (12) years, had elapsed****;*
g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and
h) That the nature of the property was such that in the light of the foregoing/adverse possession would result.

Now, based on the above position of the law, even if the appellant could not have compensated the original owners in 1990s, the appellant's occupation and possession of the land for over 12 years without interruption was sufficient to grant ownership under the doctrine of adverse possession. Without putting more colours, the suit was time-barred and the respondent had lost her right to recover the land.

Two, the respondent's letter clearly shows that the land was previously owned by the respondent's father and later taken by TANESCO since 1992. The contents of the letter contravene the whole evidence and allegations that the land was leased by the appellant who later surveyed it without the knowledge of the respondent's mother. By virtual of the contents of the letter, it was not expected for the respondent to claim it while knowing that it belonged to TANESCO. With respect, presumably, the respondent might have met unscrupulous persons who ill-advised her. A reasonable person could not have claimed a land which does not belong to his/her. Up to this point, I have taken time, at least, to clarify the legal issues and venture into justice of this matter.

As already stated, the proceedings of the trial tribunal are a nullity for lack of assessors' opinion. Also, under the law of limitation, this suit was time-barred because the respondent claimed the recovery of the land after the expiry of 12 years. Over all, the evidence and other information contained in the Court file do

not suggest, even on mere balance of probability that, the land belongs to the respondent. Finally, I hereby allow the appeal and nullify the proceedings of the trial tribunal and the decision thereof. In my view, it may be wastage of time and resources to order retrial of the case because the respondent has no good case to against the appellant. No order as to costs. It is so ordered.

Date at **Bukoba** this 13th August 2021.

Ntemi N. Kilekamajenga
Judge
13th August 2021

Court:

Judgement delivered this 13th August 2021 in the presence of the parties present in person. Right of appeal explained.

Ntemi N. Kilekamajenga
Judge
13th August 2021