IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO 60 OF 2020

DENIS KUBOJA MBUGE.....1ST APPELLANT

JAMES DANIEL KUBOJA .....2ND APPELLANT

VERSUS

PRISCA JUSTINE MAINGU .....1ST RESPONDENT

ANASTAZIA JUSTINE MAINGU .....2ND RESPONDENT

SIMON JUSTINE MAINGU .....3RD RESPONDENT

(*Arising from Land Application No. 224/2016 in the District Land and Housing Tribunal for Mara at Musoma*)

JUDGMENT

9th & 23rd August, 2021

Kahyoza, J.

Prisca Justine Maingu, Anstazia Justine Maingu and Simon Justine Maingu (the respondents) sued Chumwi Village Council, (the Village) Denis Kubhoja Mbuge (Denis) and James Daniel Kubhoja (James) claiming a piece of land before District Land and Housing Tribunal (the **DLHT**). The **DLHT** decided in favour the respondents. Aggrieved, Denis and James appealed to this Court. Denis and James raised eight grounds of appeal. During the hearing, Denis and James' advocate, Mr. Mahemba abandoned the third, five and six grounds of appeal. He retained the following grounds of appeal.

1. That, the trial tribunal erred in law to declare the respondents the legal owner of the disputed land while the evidence of the appellants was heavier than that of the respondents.
2. That, the trial tribunal erred in law to order demarcation of boundaries between Kuboja's land and the respondents' land while there is no dispute relating to boundaries between the appellants and the respondents.
3. That, trial tribunal erred in law to determine the matter in favour of the respondents while the suit was res judicata basing on land application No. 278/2016. Hence the trial tribunal ignored its previous order/decision.
4. That, the trial tribunal erred in law far failure to make proper analysis and evaluate of the evidence and exhibits hence arrived at the erroneous decision which is not supported by the evidence on record.
5. That, the trial tribunal erred in law to rely on the testimonies of the land officer from Musoma Municipal Council while Musoma Municipal Council was not the allocating authority.
6. That, the trial tribunal erred in law and fact when it failed to take judicial Notice of the copy of the Hati ya Kimila ya Ardhi (customary Right of Occupancy) which entitles 2nd appellant Denis Kuboja Mbuge the rights over ownership of the land in dispute.
7. That, the trial tribunal erred in law when it disregarded long history of the appellants' ownership of the disputed land for over 12 years.
8. That, the trial erred in law and fact by relying on all exhibits tendered by the respondents (original applicants) in which the witnesses were

never examined in chief on the contents of such exhibits by counsel for the original applicant (now the respondent) in the trial tribunal which then renders their weight shaky as no evidence at all was ever led regarding contents of the said exhibits.

Briefly, the respondents claim was that the village allocated their land to Denis and James without complying with the laid down procedure. The respondents claimed further that their father allocated the disputed land to them. Justine Maingu transferred the disputed land *inter vivos* to the respondents. The respondents evidence was that Justine Maingu died in 1970 and was buried in his land.

On the other hand, the appellant's case was that the disputed land belonged to Petro Mrefu Kubhoja, Daniel Mbuge Kubhoja, Mshangi Kubhoja and Anania Maingu Kubhoja. They were allocated the land by the chief in 1924. In 1930 Maingu Mkama started living with Anania Maingu. Later, Maingu Mkama shifted from the place he was living to the upper part of the land because of the hippopotamus threatened their lives. It is the respondent's account that the respondents left the suit land during operation Vijiji in 1974 and started living at Mwisenge. According to Denis' evidence, his grandmother Dinna occupied and cultivated the disputed land till she died. After his grandmother Dinna, clan members met on 21/10/1996 and appointed him a caretaker of the clan land. Denis decided to register the disputed land as his own land and tendered the customary right of occupancy "*Hati Miliki ya Kimila*" as Exh. DE3.

It is undisputed fact that before current dispute, there was another land dispute involving the same subject matter. The disputed was between Prisca Maingu and James (Jemsi) Daniel. It was Land Case No. 14/2016 before the ward tribunal of Nyamrandirira. The ward tribunal decided in favour of Prisca Maingu that the disputed land belongs to her. Prisca Maingu sought to execute the decision of the ward tribunal in land Case No. 14/2016 through Misc Application 278 of 2016. Denis Kubhoja Mbuge instituted objection proceedings contending that the disputed land belonged to him. He produced the customary right of occupancy. "*Hati Haki Miliki ya Kimila*". The **DLHT** dismissed the application for execution. After Prisca Maingu's attempts to execute the decision of the ward tribunal failed, she joined Anastazia Justine Mangu (Anastazia) and Simon Justince Miangu (Simon) to sue Chumwi village Council (Village) Denis Kubhoja Mbuge and James Daniel Kubhoja.

The claim of Prisca, Anastazia and Simon against the village was that she (the village) condoned Denis Kubhoja Mbuge to acquire the disputed land illegally. The claim against the Denis and James was the same as they are son and father respectively. Denis and James refused the claim and contended the applicants and their mother abandoned the disputed in 1974 during operation Vijiji. They moved to Mwisenge – Musoma and none of them return to cultivate the disputed land. They contended that since the applicants left their land during operation Vijiji have no right to claim it. They added that Denis was the lawful owner of the suit land as he occupied it for 42 years effectively.

The village stated in rely that Denis acquired the customary right of occupancy without following the procedures. For that reason, the customary right of occupancy was invalid.

Denis and James appealed against the decision of the **DLHT** and Mr. Mahemba, learned advocate represented them. The village appeared through Mr. Maiga Bugingo and Mr. Wambura, learned advocate, represented the respondent. They argued the appeal orally. I will reproduce their submissions while discussing the issues raised in this appeal.

Is the evidence of appellants heavier than that of the respondent?

The appellant complained that the **DLHT** erred to find the respondents legal owner while the evidence of the appellants was heavier than that of the respondents. The appellant's advocate submitted that the appellant's evidence was that their late father gave them the disputed land in 1967. He added that the appellants specified the boundaries of the land their father gave them. The respondents did not specify the boundary of the land their father gave them and whether the boundary was still the same when the dispute ensured. He explained that the current dispute arose when **TANROADS** was valuating exhausted improvement to compensate owners of the land it acquired for contracting the road. The dispute was over the boundary while testifying the respondents claimed 11 acres of land. Mr. Mahemba was emphatic that parties are bound by their pleadings.

The appellants' advocate submitted further that the appellants' evidence was very strong heavier than that of the respondents. He stated that Thomas Daniel (**Dw2**) deposed as to the historical background from 1924. He pointed out how the land moved from one person to the other within the appellants' lineage. Thomas Daniel (**Dw2**) explained that after the death of their mother, Good James Kubhoja and Denis James Kubhoja were appointed caretakers of the land in dispute. Thomas Daniel (**Dw2**) described the boundaries of their land. Thomas Daniel (**Dw2**)'s evidence was corroborated other appellants' witnesses. Denis (Dw3) deposed that he was appointed a caretaker as shown by Exh.DE1 and he applied and obtained the customary right of occupancy.

Mr. Wambura, the advocate who represented Prisca, Anastazia and Simon (the respondents), submitted that there is no dispute that his clients are siblings and that their father gave them the land in question. The land changed hands *inter vivos* between the respondents' father and the respondents. He submitted that the respondents described the boundaries of their land and explained the acreage as shown in the judgment at page 1 and 6. He added that it was not true that Denis and Good were appointed as caretaker in 1996 as alleged. He contended that a caretaker is always caretaker. They were not allowed to seek and obtain the customary right of occupancy.

The village attended the hearing through Mr. Bugingo, the village chairman who had nothing to amplify to his reply to the memorandum of appeal. He adopted the reply.

I considered the rival submissions and the evidence on record and discerned from evidence is that both parties gave convincing evidence. I also found it proved beyond the balance of probabilities that the appellants have a piece of land bordering the respondents' piece of land. Thus, the appellants' evidence is heavier regarding the land they own and not regarding the disputed land. The respondents' evidence is also heavier to the extent that their father owned a piece of land and that the land passed from their father to them. I was impressed by the evidence of Nicholaus Dominic (Pw3) (81). He deposed that the disputed was over the land between Simon Justine Maingu and James Daniel Kubhoja. He deposed that he knew that land in question from 1949 as the property of the respondents' father. He witnessed the respondents' father allocating the disputed land to the respondents and Flora (who is now dead) in 1967. He deposed the respondents' father was buried at his land, the disputed one and no dispute arose at the burial ceremonies. He deponed that if there was any dispute ought to have come out at that time **as that is what the Gita customs states**.

Nicholaus Dominic (Pw3)'s evidence was supported by Joseph Magoma (Pw4) (68). Joseph Magoma (Pw4) deposed that the respondents' father was his Godfather. He used to visit him and that he witnessed him allocating land to the respondents. During cross examination, he stated that the dispute was over the boundary which has turned out to be the dispute over the title. The two witnesses established that the respondents' have a piece of land at Chmwi village, which their father gave them.

I also noted that the respondents explained the boundary of their land. Prisca (Pw5) deposed that-

> *"Land is bordered by the land of Mzee Nyamwera, then the lake left Manyama Busembera and with right Denis Daniel Kubhoja"*

The appellants' advocate did not cross examine her regarding the boundary. Failure to cross-examine the witness on an any crucial evidence lends credence to the veracity and cogency to that piece of evidence.

Anastazia (Pw2) deposed that the side that focus the late is bordered by James D. Kuboja on the right-hand side, the land is bordered by Manyama Msembera.

Denis (Dw3) deposed that he was living with his grandmother and later in 1996 he was appointed together with his brother Good James to take care of the clan land. He added that their land was surveyed. He described the boundaries after the survey was conducted. I consider Denis (Dw3)'s evidence, I was not convinced by his evidence, to say the least. He did not account how he got the disputed land. As if that is not enough the boundary and the acreage he described depended on the questionable land survey. He deposed that *'I have the letter dated 5/4/2015 the application for the survey of the land .....this letter concern the application for the survey of the land that is located at Mtakuja hamlet Chumwi village the land is the subject of this case. The aim was to protect the land following the often disputes that were arising on the boundaries,* ***the other reason is to recognize the size of the land****, that the other reason to request for the survey was the project of the planting trees "shamba darasa"*

It is clear from Denis (**Dw3**) that the boundaries were not clearly marked. Thus, even if the respondents had not clearly stated the boundary that alone would not have been the reason to hold that they had no land at Chumwi village. The appellants (Denis Dw3) described the bonders after the survey was conducted. All in all, I find it established that the respondents established the boundaries of the disputed land.

Thomas Daniel (**Dw2**) gave an historical background basing on what he alleged he got from his parents. It was hard to believe his evidence. At one time, he stated that Maingu Mkama had no land as he was a mere invitee. He deposed:-

> *"Your honour what I know about the suit land, it was the land that was owned by 4 parents namely Petro Mrefu Kubhoja, Daniel Mbuge Kuboja, Mshangi Kuboja and Anania Maingu Kubhoja ..... in 1930, their mother told them that, where they came from there was a grandson called Maingu Mkama. The elder brother called Petro was sent to bring the grandson then the grandfather was called when Maingu Mkama was brought. So Maingu was still young so he stayed in the house of Anania Maingu..."*

He further testified that, in 1970 Maingu Mkama died. He was buried near the road. In 1974, there was operation Vijiji Mkama's children shifted to Mwisenge since that time they never came back. One wonders if it is true that Maingu Mkama was an invitee had no land why did depose that Maingu Mkama was buried on his (Maingu Mkama) land. He gave contradicting evidence.

During cross-examination Thomas Daniel (**Dw2**) deposed that he was born in 1936 and that in 1974 he was living Dar es Salaam and that his parents were buried to their land different from where the respondents' father was buried.

I was not moved by Thomas Daniel (**Dw2**)'s evidence, as to great enter was hearsay evidence. His evidence was based on history, what he heard from his grandparents. He had no direct evidence. As shown above his evidence was contradictory. If the respondents' father had no land, because he was an invitee, he had no land to pass over to the respondents. Thus, the respondent had no land to abandon in 1974.

In addition, Thomas Daniel (**Dw2**) deposed that he was a civil servant and that in 1974 he was living and working in Dar es Salaam how did he know that the respondents had abandoned their land. Had it been true that that the respondents abandoned the disputed land the appellant would have acquired land by adverse possession. The appellant did not prove to have been in actual possession for a period of over 12 years.

The appellants pleaded that they were in occupation of the disputed land for more than 42 years. There was no evidence of such occupation Denis (Dw3) deposed that he was 47 years old, it means he started possessing the disputed land adversely when he was 5 years old. Such piece of evidence did not convince me.

Having considered the submission and reviewed the evidence, I find it proved that there was enough evidence that the respondents' father owned the disputed land. The boundary of their land is the lake, the land

that belongs to Mzee Nyamwera and Mzee Manyama Busembere on the left and Mr. James Danile Kubhoja, on the right.

Did the tribunal err to order demarcation of boundaries?

The appellant complied that the trial tribunal erred in law to order demarcation of boundaries between Kubhoja's land and the respondents' land. The respondents replied the trial tribunal ordered properly as the appellants used to encroach on their lands.

I will not dwell on this issue, as the appellants' evidence speaks louder in support of demarcating the land. Denis (Dw2) deposed that he requested his land to be surveyed as there was frequent disputes over the borders. Not only but also the fact that Denis (Dw3) conducted survey without involving the neighbor he must have disturbed the boundaries. It was proper although it was not one of the prayers of parties, to demarcate the piece of land that belonged to the respondents from the land the appellants claimed to own. I am alive of the principle that court should not grant prayers not pleaded. Given the fact that that the appellants disturbed the boundaries of the disputed land, it was vital to order the demarcation of the lands between the parties.

Did the trial court make proper analysis of exhibits and evidence?

The appellants complained that the trial tribunal erred in law for failure to make proper analysis and evaluation evidence and exhibits hence

arrived at the erroneous decision which was not supported by the evidence on record.

The appellants' advocate submitted that Denis (Dw3) after he was appointed as a caretaker in 1996, as per Exhibit D1 he applied and obtained the customary right of occupancy Exh. D3. The right of occupancy was signed (*Afisa Ardhi Mteule*) the District Land officer. He added that the DLHT had no mandate to nullity it but to send it to the authority who issued the same.

The respondents' advocate submitted that the customary right of occupancy issued to Denis (Dw3) was not genuine. He contended that the customary right o occupancy would not be properly issued without the village council participating in the process. He supported his argument by contending that the Village Land Act, Cap. 114 has elaborate procedure.

The village Council's representative submitted that the customary right of occupancy was not genuine, as there was no village general assembly's meeting which authorized the customary right of occupancy to issue. He added that it was proper for the District Land officer to cancel the customary right of occupancy as the same was not yet registered.

Indeed, the Village Land Act, Cap 114 provides for the procedure to grant a certificate of customary right of occupancy. The procedure is provided under S. 22 to 31 of the Village Land Act. There are also procedures regarding allocation of land by the Village Council. In the present case, the appellants applied to be granted the certificate of customary right of occupancy. Reading S. 22 (1) which states **that a**

person, a family unit, ... may apply to the village council of the village for a customary right of occupancy, I get on impression that the person applying is the owner of the land. He is not applying to be allocated land. In addition, S. 23 (a) makes it mandatory for the village council before granting the certificate of customary right of occupancy to must consider **rights in the land which is subject of the application**. It stipulates thus-

> *"23(2) (a) In determining whether to grant a customary right of occupancy, the village council shall –*
>
> a) *Comply with the decision that have been reached by any committee or other body on the adjudication of the boundaries to and* ***rights in the land which is the subject of the application for a customary right of occupancy***" (emphasis is added)

It is this Court's construction upon reading the above provision of the law, that the certificate of customary right of occupancy does not grant title to a land which the applicant does not own. Further It is this Court's holding that the certificate of customary right of occupancy is void, if it is granted without considering **the rights in the land which subject of application**. There is ample evidence that Exh. D3 was issued without considering the rights in land subject of the application. In addition, there is ample evidence that in granting the certificate of customary right of occupancy that the procedures were not followed.

The appellants deposed and their advocate submitted, that the District Land Officer (Afisa Ardhi Mteule) signed the certificate therefore the same was genuine. This is argument is fallacious. The village, through its village chairman testified that the village council did grant the certificate of customary right occupancy as it was not registered. Not only that but also the District Land Officer (Afisa Ardhi Mteule) wrote a letter exhibit P.E6 that the certificate of customary right of occupancy was void as the same was obtained by fraud. Exh. P.E 6 reads:-

> "*Kwamba mikutano hiyo yote miwili inaonyesha kuwa* ***hati hizo za kimila ni batili kwa kuwa mamlaka zote zimethibitisha kwa ndugu Denis Kubhoja Mbuge alitumia njia ya udanganyigu kujipatia haki asiyostahili***" (emphasis is added)

With the above evidence from the offices which took part in the process of granting the certificate of customary right of occupancy, I wonder where did the appellants gather strength to challenge the trial tribunal's finding. The tribunal's finding was that there was no evidence to establish that Denis (Dw3) owned the suit land. I will produce the tribunal's findings, which I agree with it in total-

> *"Fourth, the second respondent who testified as Dw3 has failed even to call a single witness to back up his case that he own(ed) the suit land or to challenge the evidence of DW1, the chairman of the village council to prove his case. The DW3 has totally failed to remember the dates when he was called to appear either before the village council or village assembly met to discuss his*

application. Beyond that the 2nd and 3rd respondents (the current appellants) have failed to call one clan member apart from the family of Daniel Kubhoja to give evidence that the suit land is clan land. That Dw2 and Dw4 are brothers, the sons of Daniel Kubhoja and the DW3 is the son of DW4. This tribunal asks another question why only members from one family while they claim the land to be clan land."

I also considered the evidence that Denis (**Dw3**)'s clan members appointed him a caretaker of their clan land. The appellants tendered Exh. DE1 to prove that. Like, the trial tribunal I wonder why did the appellants not call any other member of their clan to prove that there was such a meeting that appointing him and one Good James Kubhoja as caretakers. Even if for the sake of argument, Denis (**Dw3**) was so appointed, why did he apply to be granted the certificate of customary right of occupancy in his own name excluding the other nominee caretaker. Not only that but also how did he acquire the right to own the land he was appointed to take care on behalf of the clan. A caretaker has no share in the land, his sole function is to look after it and manage it. See the case of **Petro Kinani V. Dariagnes** (1968) HCD 199, in that case. After the deceased died, the appellant was installed as caretaker of the land in possession of the deceased at his death. The appellant was later expelled from the property by the respondent and her sister. He claimed to be entitled to a share of the estate. Duff J. held that-

"*The appellant was not entitled to any share of the land his sole function being to look after it and manage it*".

Denis (**Dw3**), even if he was appointed a caretaker, had no right to claim ownership. He was a mere caretaker. Thus, Denis (Dw3)'s claim of ownership was fallacious and obtained fraudulently.

This Court cannot buy Denis (Dw3)'s fraudulent acts. I find that the tribunal was right to give no weight to the certificate of customary right of occupancy, Exh. DE3. It was right to give weight to Exh. PE6 the letter from the District Land Officer (*Afisa Ardhi Mteule*) to the extent that the certificate was void or a nullity.

In the end, I find that the trial tribunal did properly consider the exhibits and analyze the evidence on record.

Did the appellants occupy the land for over 12 years?

The appellants complained that the tribunal erred in law when it disregarded long history of the appellants' ownership of the disputed land for over 12 years. The appellants' advocate did not elaborate this ground of appeal.

The village rebutted the complaint, contending that the respondents were cultivating the land and there was their father's grave. The respondents contended that the disputed land belonged to them.

I have already answered this issue. The appellants did not produce evidence to show that they were in actual possession of the land. There is

no dispute that the respondents moved away from the disputed land but they proved *animus revertendi*. They were visiting the land frequently, cultivating maize potatoes every year. (See the evidence of Prisca (**Pw5**)) at page 42 of the typed proceedings). Thus, the respondents never abandoned their land completely. In addition, the appellants failed to establish that they were in actual possession of the disputed land. A party claiming to accrue title by adverse possession must establish both ***animus possidendi*** and ***corpous possession***, *viz* some visible state of affairs. The appellants proved no ***corpous* possession** of the disputed land for over a period of over 12 years. In the case of **Registered Trustees of Holy Spirit Sisters Tanzania v January Kamili Shayo and 136 others** Civil Appeal No. 193 of 2016, Court of Appeal (Arusha), the Court of Appeal held-

Thus, on the whole, ***a person seeking to acquire title to 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 color of right to*** *be there other than his entry and occupation;*
d. *That the* ***adverse possessor had 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. (emphasis is added)*

It is also my considered view that the principle of adverse possession would not apply in the present case as the appellants' evidence is that the disputed land was their land. It was a clan land. One cannot acquire his only land by application of adverse possession. Not only that but also the appellants did not prove that ***openly and without the consent of the true respondents did acts which were inconsistent with the enjoyment by the respondents, the true owner of land for purposes for which he intended to use it.*** See the case of **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 others** (supra). I, therefore find that the trial court did not err not to find that the appellants acquired land by adverse possession.

Did the tribunal err to rely on exhibits tendered by the respondents without examination in chief?

The appellants stated in the eighth ground of appeal that the trial tribunal erred in law and fact by relying on all exhibits tendered by the respondents (original applicants) in which the witnesses were never examined in chief on the contents of such exhibits by the council for the original applicant(s) (now respondent(s)) in the tribunal which then render their weight shaky as no evidence at all was ever led regarding contents of the said exhibits.

The respondents' advocate replied that the documents were tendered and the contents read.

The appellants' advocate did not explain this ground of appeal. My understanding of the ground eighth of appeal is that the respondents' witness did not lay ground before tendering the exhibit.

I examined the record and found that Simon (Pw1) gave as account of each exhibit before he tendered it some of the exhibits were admitted without objection, while some were objected too and the objection overruled. For example, Simon (Pw1) explained how they obtained a letter from the Authorized District Land Officer/ District Land Officer (see page 25 of the typed proceedings). He stated " *that after we received the letter from the Chumwi village we wrote a letter to DED of Musoma District Council attacking the letter form Chumwi village council.*"

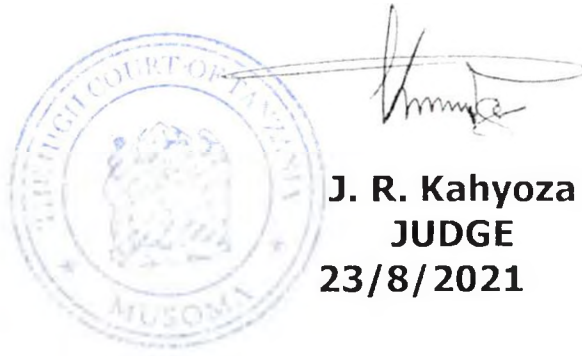
I therefore, do not see the bases of the complaint. I find the eighth ground of appeal without merit.

In the upshot, I find that tribunal was right to find that the respondents proved their case on the balance of preponderance that the disputed land belongs to them. I uphold the decision of the DLHT and find the appeal without merit. Consequently, I dismiss the appeal with costs.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
23/8/2021

Court: Judgment delivered in the presence of the appellants in person and the first respondent. B/C Mr. Makunja present.



J. R. Kahyoza
JUDGE
23/8/2021