

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND DIVISION

(APPELLATE JURISDICTION)

MISC. LAND APPEAL NO 06 OF 2020

(Arising from Misc. Land Application No. 23/2020 of the High Court of Kigoma, Before A. Matuma, J., Arising from Land Appeal No. 103/2018 of the District Land Housing and Tribunal of Kigoma Before, F. Chinuku – Chairperson, Original Land Dispute No. 1/2018 Mkongoro Ward Tribunal)

JUMANNE S/O CHIMPAYE.....APPELLANT

VERSUS

DAUD MOHAMED NKWAJE

(Administrator of the estate of the late **Mohamed Nkwaje**)..... **RESPONDENT**

JUDGMENT

02nd August, & 20th September, 2021

A. MATUMA, J.

The appellant herein successfully sued the respondent in the Ward Tribunal of Mkongoro Ward over the dispute of Land (farm) at Chankele Village. He had alieged at the trial tribunal that he customarily acquired the dispute land, lived there with his mother, born Six issues thereat and two of them died and buried thereon. During operation Vijiji in 1974 he shifted to

another village (Bubango) with his children but left the dispute land with some palm trees under the care of his young sibling but he continued to cultivate and harvest the fruits therein up to 2017 when the respondent trespassed and the problem arose.

The respondent on his party (Mohamed Nkwaje now deceased) counter argued the claim against him at the trial and argued that he bought the dispute shamba from the appellant's step father forty-three (43) years back prior to the arising of the herein dispute. The appellant's step father who was allegedly sold the dispute shamba to the respondent is one Ali Kebelo.

The trial tribunal on the strength of the evidence of the appellant allowed the claim. Ordered vacant possession against the respondent and costs of the suit to the appellant against the Respondent. In reaching to such decision the trial ward tribunal had observed that; the Respondent during the visit to the locus in quo failed to identify the boundaries of the dispute farm he alleges to be his, and that, even his witnesses failed to identify the boundaries of the dispute shamba. Further and more so, the trial tribunal held;

'Pia Ushahidi wa Mohamed wa kununua eneo la mgogoro haukupatikana. Wajumbe wa baraza waligundua kuwa mashahidi wa Mohamedi wote hawalijui shamba na njia alivyolipata Mhamedi.....



Baraza la kata limeridhika na Ushahidi wa mlalamikaji. Hivyo eneo la mgogoro ni eneo halali la Jumanne Chimpaye'.

It is from such decision which aggrieved the respondent hence an appeal to the District Land and Housing Tribunal for Kigoma whose decision is the subject matter of the instant appeal.

In its decision the appellate tribunal observed that the appellant was duty bound to join the seller of the dispute land to the respondent and someone who is alleged to have bought a piece thereof from the respondent.

The appellate tribunal further observed that the suit at the trial tribunal was time barred for the respondent herein had a long stay in the dispute farm for over and above 12 years which is the statutory limitation. It thus decreed the respondent as the lawful owner of the dispute shamba for his allegedly long stay;

'The appellant's long stay at the suit land should not be disturbed'.

Such decision aggrieved the appellant hence this appeal. When this appeal was still pending it was reported that the respondent in person Mohamed Nkwaje passed away and it is when the current respondent by virtue of his administration of the estate was substituted as the respondent by leave of this court.

In his amended petition of appeal, the appellant raised four grounds which were argued jointly at the hearing of this appeal. The joint argued grounds had complaints whose essence is that;

The appellate District Land and Housing Tribunal erred to set aside the decision of the trial Ward Tribunal without scrutinizing the evidence on record.

At the hearing of this appeal both parties were present in person and had the services of learned advocates. Mr. Sogomba learned Advocate represented the appellant while Mr. Kagashe learned Advocate represented the respondent.

Mr. Sogomba learned Advocate argued at length on the ground and how the appellant acquired the dispute land, lived thereon, cultivated it and continued to harvest the crops thereof even after his shift to another village until in the year 2017 when the respondent trespassed thereat.


The learned Advocate complained that the appellant's evidence was totally not considered by the appellate tribunal and rather it was the respondent's evidence which was considered.

He faulted the respondent's evidence that he purchased the dispute land from Ali Kebelo as there was no such evidence. He also faulted the appellate tribunal to have relied on the principle of adverse possession which he argued that it was not applicable in the circumstances of this case

where the respondent had alleged title over the suit land by way of purchase. In the circumstances, it was the evidence of the alleged purchase which ought to have been tendered and proved and not adverse possession. On this he cited to me the decision of this court in the case of **Nuru Kifundawili versus Wema Salumu**, Misc. land Application No. 134 of 2019 to the effect that adverse possession is not applicable where the title over the dispute land is alleged to have been acquired by purchase despite of the long stay it might be on the dispute land. In that respect, it is the purchase which is to be established.

The learned advocate Mr. Sogomba further argued that even the alleged long stay on the dispute land by the respondent was not proved as his witnesses did not know how he acquired the dispute land, and he himself failed to show the boundaries of the dispute land during the tribunal's visit on the locus in quo. The learned advocate drew the attention of this court on the danger of allowing bare allegations of trespassers to land that they have stayed on dispute lands for years as that might cause intruders to claim adverse possession even if they have just trespassed recently.

Mr. Sogomba learned advocate winded up his submission by arguing that despite the fact that the appellant shifted to another village during operation vijiji, his land was not allocated to any person. He pressed for this appeal to be allowed with costs.

A handwritten signature in blue ink, consisting of a stylized, elongated shape with a small vertical stroke near the top.

Mr. Kagashe learned advocate did not dispute that the appellant was the original owner of the dispute land. He however submitted that the appellant lived thereon up to 1974 when he shifted to another village and there was no evidence either that the appellant continued to use the land or that his alleged sibling Rashid Chimpaye was in use of it.

The learned advocate argued that according to the evidence on record, when the appellant shifted from the dispute land in 1974, his step father Ali Kebelo sold that land to the respondent. That the respondent started to use such land since then up to when the dispute arose after 43 or 44 years ago and that is why the District Land and Housing Tribunal observed the suit to have been time barred.

Mr. Kagashe learned advocate admitted that in the circumstances of this case the principle of adverse possession was not applicable as the respondent claimed ownership by virtue of purchase and not through trespass. He then prayed for the dismissal of the appeal with costs.

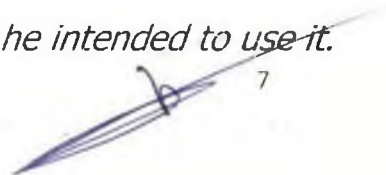
In his rejoinder Mr. Sogomba learned Advocate insisted that there is no evidence that the respondent purchased the dispute land. That even in the absence of a written contract the respondent ought to bring witnesses to that effect.

Having heard the parties as herein above summarized, it is undisputed fact that the appellant is the original owner to the dispute land. It is again not

in dispute that in 1974 he shifted to Bubango village and his land currently in dispute was not allocated to any. It is further not in dispute that the principle of adverse possession is not applicable in the circumstances of this case as the conditions to the applicability of the principle does not feature in this case as they have been held in the case of ***Hughes v. Griffin [1969] 1 ALLER 460*** and quoted in the case of Nuru Kifundawili supra, also in the case of ***Registered Trustees of Holy Spirit Sisters Tanzania versus January Kamil Shayo and Others, Civil Appeal No. 193 of 2016 CAT*** (unreported), and that of ***Jackson Reuben Maro versus Hubert Sebastian, Civil Appeal No. 84 of 2004 (CAT)*** at Arusha.

Briefly, the principle of adverse possession applies only when the following conditions are cumulatively proved;

- i. That there had been absence of possession by the true owner through abandonment.*
- ii. That the adverse possessor had been in actual possession of the piece of land.*
- iii. That the adverse possessor had no colour of right to be there other than his entry and occupation.*
- iv. 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.*



- v. *That there was a sufficient animus to dispossess and an animus possidendi; that the statutory period, in this case twelve (12) years, had elapsed.*
- vi. *That there had been no interruption to the adverse possession throughout the aforesaid statutory period*
- vii. *That the nature of the property was such that in the light of the foregoing adverse possession would result.*

As I have said earlier herein above, the parties in the instant appeal agreed that the principle of adverse possession does not apply in the circumstances of this case because the herein criteria for the principle to apply have not been cumulatively met, particularly when the Respondent did not allege trespass in the dispute land but purchase for value. In that respect this appeal can only be resolved by answering two issues;

- i. *Whether there was sufficient evidence adduced by the respondent that he purchased the dispute land from Ali Kebelo.*
- ii. *Depending on the outcome of the first issue above, whether there was sufficient evidence adduced by the respondent to the effect that Ali Kebelo had good title to the dispute land to pass it to him.*

The two issues have been formulated from the evidence on record and submissions of the parties at the hearing of this appeal for the purposes of determining the real question in controversy between the parties.

As in respect of the first issues, it was the respondent's contention during trial that he bought the dispute land from Ali Kebelo the appellant's step father;

'Mimi hilo shamba aliniuzia Ali Kebelo'

Even during cross examination as to whether he customarily acquired that land, he was very clear;

'Napamiliki kama niliyenunua'

When he was asked on the evidence of his alleged purchase he contended that there were no local leaders in witness of his purchase but some witnesses who are all dead;

'Swali: Wakati mnauziana kulikuwepo viongozi walioona wakati mnauziana?'

'Jibu: Hapana ila walikuwepo mashahidi isipokuwa wameshakufa'

In the circumstances of such evidence, it is quite clear that there was no strong evidence from the respondent that he in fact bought the dispute land from Ali Kebelo. This is because he had bare testimony without any support. He did not even mention the amount of money he used to purchase the dispute land as the purchase price or even any other sort of the lawful consideration to the alleged sale agreement. When the

respondent was asked during trial if he involved any leader in his alleged purchase he categorically stated as quoted herein above that no any leader was involved. He did not adduce any reason for not involving the local leaders who were expected to recognize him as a new possessor of the land in the locality from the original owner.

When he was asked about witnesses to the sale and purchase he alleged that they are all dead without even naming who were they and when they passed away. Had he named those witnesses it would be helpful to ascertain if it is true they are all dead and whether they are known people in the locality. His concealment of the purchase price or consideration, name of witnesses and none-involvement of local authority is inconsistent to his alleged purchase. His allegations of purchase are thus bare and valueless worth to be dismissed as I once held in the case of ***Ulimwe Rashid t/a Ujiji Mark Foundation versus Kigoma/Ujiji Municipal Council, Land Case No. 13 of 2016***, High Court of Tanzania at Tabora.

In fact, it is dangerous for the court of law to allow bare words which are simply stated such as '**NILINUNUA**' without any supporting evidence documentary or oral. That would put into danger the rights of innocent owners of the lands in dispute. It is also not born in mind that the respondent purchased the dispute land from a third party on the very day when the Appellant shifted therefrom in 1974. If the appellant shifted to operation vijiji, what would be justifiable cause for the responder

occupy the vacated land soon and on the same time the appellant had vacated. If it was the shift due to villagization, then it was for all villagers and that did not mean some other people from somewhere else to come and occupy the vacated land. It is in the circumstances of the herein observations, I join hands with Mr. Sogomba learned advocate and rule out that there was no strong evidence on record to prove that the respondent bought the dispute land from Ali Kebelo.

As in respect of the second issue which depended to the outcome of the first issue, it would suffice not to determine it as I have already ruled out that there was no evidence to the satisfaction of the court that Ali Kebelo did actually sale to the respondent the dispute shamba.

Even though, I feel obliged to talk a bit on it. Even if there would have been sufficient evidence that the respondent indeed bought the dispute land from Ali Kebelo, he was still duty bound to establish a better title of the alleged vendor to have the title properly passed to him.

During trial the respondent on having been cross examined as how could Ali Kebelo sale the land which was not belonging to him he simply said Ali Kebelo sold such land to him because he had married the appellant's mother;

'Swali: Huyo aliyekuuzia shamba langu mimi bila kujua wala familia yangu yeye alikuwa nani?

Jibu: Niliuziwa na Ali Kebelo kwa kuwa alikuwa arneoa mama yao Jumanne'.

In the first instant, there was no evidence on record to establish that Ali Kebelo had married the Appellant's mother. To the contrary the evidence on record as rightly found by the trial tribunal, reveals that the appellant's mother had no husband and lived single with her two children the appellant herein and one Rashidi Chimpaye. And it was the Appellant who took with him, his mother and his sibling for care taking. Even if there would be such evidence, that she lived with Ali Kebelo as her husband, the mere fact of such alleged marriage could have not entitled him to sale the property of his step son (the Appellant herein).

When the trial tribunal asked him where did Ali Kebelo got the farm he simply replied;

'Hilo shamba ilikuwa mali yake'

'Mali yake' on what evidence, no explanation. He was further asked whether the appellant herein and his brother or even their mother witnessed the alleged sale and he categorically replied that none of them witnessed nor was present. How then could he be sure that Ali Kebelo was selling his lawful property. Not only that but if we have to believe the averments of the respondent that Ali Kebelo was the husband of the Appellant's mother and that the shamba in question was his property he was in law required to establish that there was spouse consent to the

disposition of the property as the wife is always presumed to have interest to matrimonial properties unless otherwise established. See section 2 of the law of marriage Act, Cap. 29 R.E. 2019 and the case of ***Thabitha Muhondwa versus Mwangi Ramadhani Maindo and Rehema Abdallah Mussa***, Civil Appeal No. 28 of 2012 (CAT).

In the instant matter when the respondent was asked whether the appellant's mother was present in the sale he replied;

'Walikuwa hawako naye'.

The sale and purchase as alleged by the respondent is thus unwarranted by whatever means as the alleged vendor's title on land was not established. That leaves the evidence of the appellant intact and strong that he possessed the dispute land customarily lived thereon with his family and his mother and continued to cultivate it even when he was living in the other village after his shift in 1974.

His evidence was cemented by his witnesses who are neighbours to the dispute land as was well found by the trial tribunal;

'Baraza la Kata walitaka kwenda kuona eneo ambalo lina mgogoro. Jumanne Chimpaye alionyesha shamba lake na mipaka pamoja na eneo ambalo lina mgogoro pamoja na hayo Jumanne alionyesha eneo ambalo kuna kaburi za Watoto wake na mahali palipokuwa na nyumba na choo pamoja na mashahidi wake pia nao walionyesha wanavyojua eneo la mgogoro pamoja na mpaka na maembe na makaburi pamoja

na choo wakisema kuwa wao waliishi na Jumanne pale wala mama yao Jumanne hakuwa na mume pale bali alikuwa na Watoto wake wawili'.

It is the appellant thus who has the better title over the dispute land and no any other who could properly pass that title other than him.

The second issue is therefrom resolved in the negative to the effect that there was no evidence on record to establish that Ali Kebelo had good title to pass over the dispute land.

Having resolved the two issues as herein, it is obvious that the district land and housing tribunal erred to base its decision on the doctrine of adverse possession/time limitation, sale and purchase, and none joinder of necessary parties which was not the issue before it.

I therefore, quash the judgment of the District Land and Housing Tribunal and set aside the decree thereof. In lieu thereof, the judgment of the trial tribunal is hereby restored.

This appeal is therefore allowed with costs both the costs in the District Land and Housing tribunal and costs at this court as well as those which was granted in the trial tribunal. It is so ordered. The right of further appeal to the Court of Appeal of Tanzania subject to the guiding laws thereof is hereby explained.






A. Matuma

Judge

20/09/2021

Court: Judgment delivered in the presence of the parties in person.

Right of appeal explained.

Sgd: A. Matuma

Judge

20/09/2021