IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO.40 OF 2021

(Arising from Land Appeal No.45 of 2020 of the District Land and Housing Tribunal for Tarime, Original from Land case No. 19 of 2019 of Kirogo Ward Tribunal).

SILA OBEL.....APPELLANT

VERSUS

CLEMENTINA KANGA..... RESPONDENT

JUDGMENT

26th August and 16th September 2021

F.H. MAHIMBALI, J.:

The appellant, Sila Obel is aggrieved by the concurrent decisions of the two lower tribunals in which ruled in favour the respondent. He first unsuccessfully instituted a land suit against the respondent, Clementina Kanga at Kirogo ward tribunal. His appeal at the first appellate tribunal (Tarime District Land and Housing Tribunal), was also unsuccessful.

Before proceeding further, I find it apt to narrate, albeit brief, the background material leading to this present appeal.

The appellant alleged that he had acquired the disputed piece of land through inheritance from his father and on the 10th day of September, 2019 he found his land was cultivated by someone he did not know. He inquired on who had cultivated on his land and he was told that it was Dudu Kanga. He decided to report the incidence to the village leaders. Dudu also informed the appellant that he was working under the directives of the respondent. The leaders decided to write a letter dated 30/10/2020 to ban Dudu from cultivating on the disputed land. The appellant further claimed that his late father had allowed the respondents to use their land for two years and after that he banned them. This was before the demise of his father. He also tendered a customary tittle deed tittle "HATI YA HAKIMILIKI YA KIMILA" No. 06 dated 08th May, 2015 to prove his ownership of the land.

On the other hand, the respondent alleged that the appellant invaded into her piece of land by chasing her workers. She claimed she acquired the disputed piece of land from Kanga Oweru, who was her late husband and he died in 1991. She went on to state that after the appellant had reported her to the village leaders, she was called and they visited the locus in quo and later on had a clan meeting. During the clan meeting she was advised by her children to leave the piece of land

on the North side to the appellant. However, the appellant refused to accept that part of the land and decided to institute the civil suit at Kirogo ward tribunal.

What was decided at the ward tribunal did not amuse the appellant, hence he appealed to the District Land and Housing Tribunal (DLHT) for Tarime at Tarime in Land Appeal No. 45 of 2020. The DLHT heard the parties and in the end, it upheld the decision of the ward tribunal and dismissed the appeal with costs.

Still unamused with the DLHT decision, the appellant has preferred the present appeal by raising five grounds of appeal. The five grounds of appeal as contained in the petition of appeal in verbatim are as follows;

1. *That, the 1st Appellate tribunal erred in law and facts for disregarding the strong evidence tendered by the Appellant at the trial tribunal which showed clear that the land in dispute belong to the appellant.*
2. *That, the 1st Appellate tribunal erred in law and facts for disregarding documentary evidence tendered by the appellant which showed clear that the land belong to the Appellant.*
3. *That, 1st Appellate tribunal erred in law and facts for disregarding the fact that, it is the father of the appellant who*

gave the land to the respondent, and later the land was handled to the father of the appellant as witnessed by the Respondent witness during the trial tribunal OITO ONYANGO and NASHON NDEGE OGADA.

4. *That, 1st Appellate tribunal erred in law and facts for upholding the decision of the trial tribunal which favored Respondent while respondent had weak evidence as her witness testified that the land belong to father of the appellant, evidence of OITO ONYANGO and NASHON NDEGE OGADA.*
5. *That, 1st Appellate tribunal erred in law and facts for upholding the decision of the trial tribunal which favored respondent while the land in dispute since 1987 to 2019 for 32 years without interference from the respondent to date. The 1st appellate court failed to consider adverse possession principle.*

When this matter came for hearing, both the appellant and the respondent were present and unrepresented. The matter was heard through audio teleconference.

The appellant prayed that his grounds of appeal be adopted as part of his appeal's submission. He went further to state that the respondent is a stranger to the land as he has a title over it. He alleged that the

respondent was temporarily given the disputed piece of land by his father and later they returned it. He is perplexed as to how the respondent is the owner of the land while he has no history of the ownership.

Replying the respondent submitted that she is a widow. She stated that originally the land was owned by her husband who acquired it from her father-in-law and he had given a portion of the land to the appellant. After his demise the appellant started disposing of their land to other people. She went on to state that the appellant acquired the customary certificate of occupancy by fraud. When she intervened, the appellant decided to sue her at the ward tribunal and he lost at the ward tribunal. He also unsuccessfully appealed to the DLHT and now making a further attempt to this court. She went further to submit that the land is hers and not the appellant's. That the lower tribunals decreed correctly. She submitted that the appeal is devoid of merits and should be dismissed with costs.

Re-joining, the appellant submitted that he has the customary certificate of tittle thus has a superior right over the Respondent. He prayed this court recognizes his right and allow the appeal.

Having heard the rival submissions of the parties the ball is now on this court to decide the issue of contention, who is the rightful owner of the disputed land between the two parties.

Gathering from the grounds of appeal, there are mainly two grounds of appeal, which are *the trial tribunal erred in law and facts by disregarding strong evidence of the appellant and DHLT upholding it. The second ground is that the DLHT failed to consider adverse possession principle*.

Starting with the first ground of appeal, the trial tribunal erred in law and facts by disregarding the strong evidence of the appellant, and the DLHT upholding that decision. I have gone through the trial tribunal's records where the ward tribunal decided in favour of the respondent on the following reasons; The Customary tittle deed was defective as it did not have minutes of the clan meeting and the village leaders. The second reason is that the clan meeting minutes showed that the land belongs to the respondent. The third reason is that in the land in dispute there is a mango tree that has been there for more than 10 years and it was planted by the son of the respondent. From this is it clear that the trial tribunal considered the evidence of both parties and came up with that decision. Regarding the argument that his evidence is

stronger, he did not show how it was strong. On the strength or status of the customary right of occupancy, I am aware of the decision of the Court of Appeal of Tanzania in **Attorney General Vs LohayAkonaay and Joseph Lohay**, Civil Appeal No.31 of (1994) where the Court observed the following: "*Customary or deemed rights of occupancy in land though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution of the United Republic of Tanzania. The deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution".*

Similar position was also taken by the same Court in Rashid Baranyisa Vs Hussein Ally (2001) TLR 471, where the following were stated:

> *"The mere act of designating the area a trading centre and surveying it did not have the effect of extinguishing the holder of his deemed right of occupancy over the land and reducing him into a squatter".*

It follows therefore that in the absence of proof how that the customary right of occupancy of the appellant came into being against the respondent who was already in long occupation of the disputed piece of land and had already planted several permanent/visible

permanent plants, her rights were not extinguished automatically by issuing of the purported customary right of occupancy to the appellant.Borrowing a leaf from Hon. Justice Siyani (in the case of **Karagwe Marketing Co. Ltd Vs. Mwanza City Council and Said Meck Sadiki**, Land Appeal no.67 of 2018 – HC Mwanza (unreported), I hold that even if the appellant holds customary right of occupancy against the respondent over the same plot,in the circumstances of this case,the same cannot as by itself extinguish the respondent's rights in the suit land. In the fine, it has to be noted that though a customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy, as per section 18 (1) of the Village Land Act Cap 114 RE 2019, the same has to comply with the set down legal procedures in obtaining it.In this case at hand, the chain of ownership's episodes to the appellant is not clear and smart on how he came into possession by customary right of occupancy. By the way, the appellant being not the original owner of the said land as he claimed it belonged to his father as per his testimony at trial and submission during this appeal, by law that property is not easily transferable as stated. There ought to have been a dully compliance to law on inheritance of the said deceased land as opposed to the respondent who was the widow. That said, this ground is bankrupt of merits.

On the complaint that the DLHT did not consider the issue of adverse possession principle. The appellant alleged that he has used the land in dispute for 32 years without interference from the respondent. The law is settled that the fact you occupy land for a long time does not perse amount to adverse possession. This was held in the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January KamiliShayo and 136 others**, Civil Appeal No. 193 of 2016 at page 24

> *"In our well- considered opinion, neither can it be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession. Possession and occupation of land for a considerable period of time do not, in themselves, automatically give rise to a claim of adverse possession..."*

In the same case, it gave the guideline in proving adverse possession;

"In the foregoing remark, the High court of Kenya had referred and followed two English decisions- ***viz- Moses v Loregrove*** *[1952] 2 QB 533; and* ***Hughes v. Griffin*** *[1969] 1 All ER 460. In those cases, it was held that it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the*

permission of the owner or in pursuance of an agreement for sale or lease or otherwise. 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 consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of the land for purposes for which he intended to use it;

(e) That there was a sufficient animus to dispossess and an animopossidendi;

(f) That the statutory period, in this case twelve 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.

From the guidelines, it is clear that the appellant has not proved the principle of adverse possession.

All said and done, all the grounds of appeal are devoid of merits and are dismissed with costs.

DATED at MUSOMA this 16th day of September, 2021.

F. H. Mahimbali

JUDGE

16/09/2021

Court: Judgment delivered in this 16th day of September, 2021 in the presence of the Appellant, and Miss. Neema Likuga – RMA, the Respondent being absent though dully aware.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

16/09/2021