IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

LAND DIVISION

LAND APPEAL NO. 18 OF 2021

(Arising from Land Application No. 111/2014 of the District Land and Housing Tribunal for Kigoma at Kigoma)

CHARLES NGOBESE..... APPELLANT

VERSUS

JUMA LUPOLI.....RESPONDENT

JUDGMENT

13th September & 28th October, 2021

A. MATUMA, J.

In the District Land and Housing Tribunal for Kigoma, the Appellant sued the Respondent for trespass in Land measuring eight acres at Kisozi/Mgoti area within Kalinzi village in the District of Kigoma.

He alleged to have at one time lend the Respondent one acre out of the eight herein referred for cultivation of pineapples in the year 2000 but when it got in 2010 the Respondent without any permission expanded into the other seven remaining acres. Thereafter the respondent started to claim ownership which threw them into troubles, criminal cases and

subsequently a land dispute in the District Land and Housing Tribunal as stated herein.

The Respondent on his party did not dispute to have entered and cultivated in the dispute land which he however estimated to be seven acres nor he disputed the suitland to have been earlier on owned by the Appellant.

He however alleged that he got that shamba after exchanging for it with his own tow pieces of land at shamba area within Kalinzi village. That is, he took the Appellant's Suitland and the appellant took from him two parcels of land in a permanent exchange between them.

At the end of hearing the parties whose evidence went in line of the brief facts herein, the trial chairperson was satisfied that the parties exchanged their shambas and adjudged the Suitland to be the lawful property of the Respondent. It is from that decision the appellant is aggrieved and preferred this appeal with four grounds which were argued into only two major complaints that;

1. *The trial tribunal erred in law and facts for failure to properly evaluate and assess the evidence adduced before the tribunal.*

2. *That the trial tribunal erred to apply the principle of adverse possession.*

At the hearing of this Appeal M/S Elizabeth Twakazi learned advocate represented the Appellant while Mr. Method Kabuguzi learned advocate represented the respondent. The parties themselves were also present.

Addressing on the first ground, the learned advocate for the Appellant argued that the appellant's evidence and that of his witnesses were not well considered. She argued that the evidence shows that the appellant gave (lend) to the respondent one acre only but the respondent extended into the remaining seven acres. She faulted the evidence of the Respondent's witness DW2 one Mustafa Maulidi who stated in evidence that he did not know how the Respondent came into possession of the dispute shamba.

She argued that such evidence had no any evidential value in terms of section 62 (1) (a) of the Evidence Act, CAP. 6 R.E 2019 which requires oral evidence to be direct.

Responding on this first ground, Mr. Kabuguzi learned advocate maintained that the trial tribunal properly evaluated the evidence on record.

He argued that the evidence of the respondent revealed that he got the dispute land by exchange with the appellant and the appellant admitted

to have been given a land by the respondent which he subsequently sold to a third party.

To him the sale of the land by the appellant which he was given by the Respondent was a proof of the exchange.

He further submitted that the evidence of the respondent was corroborated by that of his witness DW2 (supra) who saw him in occupation and cultivation of the dispute land since 1988.

I will start to determine this first ground before dwelling into the second ground of appeal.

From the evidence on record, it is undisputed fact by both parties that the dispute shamba be it seven acres or eight acres was originally owned by the appellant. The appellant's own evidence is to the effect that he gave (by lending) to the respondent only one acre for growing pineapples but in the due course the respondent extended into the remaining 7 acres. On the other hand, the respondent had adduced the evidence to the effect that he took the dispute land after exchanging his own two parcels of land with the appellant.

The issue therefore, is whether there was sufficient evidence from the respondent that he exchanged the dispute land by his own land and if so

was it the exchange of one acre from the appellant or the whole dispute shamba.

In my thorough examination and re-evaluation of the evidence on record, I have not seen any evidence sufficiently to prove that the parties herein exchanged their shambas. The evidence show that each party gave another a piece of unmeasured shamba for cultivations only. The appellant gave the respondent a shamba for pineapple cultivation and the Respondent gave him a shamba for cultivation of cassava. It seems the Respondent's shamba was not supporting the pineapple cultivations and thus sought that of the Appellant which was compatible with the crops intended.

According to the Appellant the shamba he gave to the respondent was only one acre and the same was merely lending and not exchanging. And that the shamba which he got from the respondent for cultivation of cassava was just a gift and it was very small which he ultimately, he sold at Tshs 90,000/=.

It is this selling of the shamba which he was given by the respondent which was taken by the trial tribunal as corroborating evidence to the alleged exchange. That was wrong because the respondent himself during cross examination had two statements which negates the alleged exchange. **One,** he stated at page 26 of the proceedings when he was

asked why did he decided to plant some crops and or trees in the dispute shamba presumably which was not belonging to him. His reply was;

'I planted because the appellant sold my land'.

This version is indicative that the respondent forcefully remained in the dispute shamba because he was aggrieved by the act of the Appellant to have sold the shamba which he gave him while it was still his own shamba **'the appellant sold my land'.**

The statement speaks by itself in support of the appellant that what was done on the dispute shamba between them was merely lending but when he sold that which he was given by the respondent, it is when the respondent decided to plant some permanent crops in the dispute shamba to permanently deprive the appellant his ownership. It was thus a revenge.

The appellant had his own explanation as to why he sold the piece of land he was given. First of all, he stated that it was too small below an acre and was just a gift given to him by the respondent for his acceptance to lend him a shamba which was suitable for pineapple cultivation. At the hearing of this appeal, he stated that when the dispute arose between them their families settled that he leaves that one acre to the respondent in lieu of the shamba he sold as the respondent claimed back ownership

while he had given it to him. The problem is that the respondent is not claiming for only one acre but the whole dispute shamba which is eight acres.

Be it the appellant was given a shamba by the respondent as a gift or not, it is immaterial and that shamba is not the subject matter in this case. The same does not substantiate the alleged exchange.

Two, when the respondent was across examined on the measurements of the exchanged shambas at the same page 26, he stated;

> *'The land he exchanged between us is 7 acres my land I gave him may be is about 4 acres'.*

This respondent's answer is very clear that from the Appellant he took 7 acres but he himself gave the appellant the land which was below 4 acres. That cannot be exchange. Exchange must have an equivalent value or quantity. As the shambas were all in the same village, the presumption is that the respondent's land could not be valued higher than that of the appellant to the extent of exchanging less than four acres by seven acres. There should have been sufficient explanation as to why was such unequal exchange.

There is no any explanation on record and that leaves the appellant's averments that the dispute shamba was merely given (lend) to the respondent unchallenged.

Not only that but also when the evidence of the Respondent at page 25 of the proceedings is thoroughly scrutinized, it is clear that there was no exchange in the meaning of exchanging titles. If there was any exchange, it was only for cultivations of some crops each intended. The respondent testified;

> *'Kulikuwa na njaa nikampa ili alime mihogo na yeye akanipa nilime nanasi'*

With this statement, the purpose of exchange was merely for farming. Otherwise, there was no reason behind to condition the uses of the exchanged lands. Furthermore, as I have said earlier the respondent admitted that he decided to own the appellant's shamba because the appellant sold what he had given him. The respondent should have sued the appellant to recover his sold land and not to take the appellant's land forcefully. It is from that particular suit he could establish his claims over that land by establishing the size of the land due to the fact that the same is in dispute. While he contends that it was about four acres, the Appellant laments that it was just a quarter or so but it was below an acre. On the other hand, the Appellant could get two opportunities; One to establish that the said piece of land was below an acre as he contends and stating that he even sold it at Tshs. 90,000/= only to justify its smallness, and two; to defend or justify why he sold it as he is appearing to argue that the same was merely a gift to him. The Court or tribunal could then rule

)ut the rights between the parties. In the instant matter, the parties at he trial tribunal and the tribunal itself did not draw any issue(s) in respect)f the alleged exchanged of lands between the parties. Only two issues vere drawn and all related to the dispute land; ***i. Who between the)arties is the legal owner of the suit land, and ii. To what reliefs are the parties entitled.*** Therefore, a lot was left un-scrutinized to the :xtent that only vague and general claims were laid down in respect of he land allegedly given to the Appellant by the Respondent. It is only the :urrent suit land which was exhausted in evidence and the parties :oncentrated giving evidence for it.

Also, I agree with the appellant that what he lended to the respondent vas only one acre and not the whole dispute shamba. If there was any :xchange as alleged by the respondent, it was with this one acre and not he whole dispute shamba for the reasons I have stated here that there vas no equality to the alleged exchanged land.

The appellant did not agree to have even been given the alleged four ninus acres but only three quarter (¾) of an acre. The ¾ of an acre which he accepts to have been given to him by the respondent is nearly :qual to one acre which he laments to have lended to the respondent.

I therefore, allow the first ground of appeal and rule out that the trial :hairperson did not properly analyze and assess the evidence on record.

Had her properly directed her mind on the evidence on record, she could have found that there was no sufficient evidence to establish the alleged exchange of the dispute shamba. She could have found that the respondent forcefully took the appellant's shamba more than what he was lended because he was aggrieved by the act of the appellant to sale his land presumably which he had also lended to him.

The appellant is thus adjudged the lawful owner of the whole dispute shamba (eight acres) as against the findings of the trial tribunal which is hereby quashed.

As the land which the respondent gave to the appellant is in dispute to the size between ¾ of an acre or four acres, and further in dispute whether it was given to the appellant as a gift or some sort of consideration, the better remedy is for the respondent to sue on it so that he can establish its size and value to recover it from the appellant be the land itself or its momentary value. He is thus at liberty to sue the appellant on it in the Court of competent jurisdiction. I believe justice will be obtained because the land is not a movable property. Therefore, if it amounted to four acres, the same is still there even if occupied by other people and thus will be seen and established. Also, if it was only three quarter of an acre, the same is there and can be seen. Each party shall get what he deserves unlike in the instant suit whereas the size of that

land has not been established to justify equality in the alleged exchange. That will give and afford an opportunity to the appellant as I have said earlier; to enter his defense justifying his selling or remit it back to the respondent.

On the second issue as to whether the trial tribunal erred to have applied the doctrine of adverse possession, Mr. Kabuguzi learned advocate argued that such doctrine was merely imported into the judgment but was not the basis of the decision.

He argued that even though the evidence reveals that the respondent has been in occupation of the dispute shamba for long time.

On this I again agree with M/S Elizabeth Twakazi learned advoca e that indeed the trial chairperson considered the doctrine of adverse possession as one of the grounds why should the respondent be regarded a lawful owner of the dispute shamba. She held;

> *'Mleta maombi yeye anadai mjibu maombi alianza kutumia eneo mwaka 2000, haieleweki ni kwanini hakumchukulia hatua ya kumshtaki katika miaka yote hiyo tangu mwaka 2000 anaodai na mleta maombi amesubiri imepita miaka zaidi ya kumi na mbili ndio amefungua madai mwaka 2014'*

She then cited the case of ***Shaban Nassor versus Rajabu Simba (1967) HCD 233*** and ruled out;

'Mahakama zimekuwa zikisita kuwabugudhi watu ambao wamekalia ardhi na kuendeleza kwa muda mrefu na kwamba itakuwa siyo haki kuwabugudhi watu wa aina hiyo katika ukaaji wao kwenye ardhi husika'.

Then she concluded;

'Ushahidi uliotolewa unadhihirisha wazi kua mjibu maombi ndiye amekuwa akitumia eneo la mgogoro kwa muda mrefu na kwamba katika eneo hili amepanda mazao ya kudumu'.

From the herein quotations, it's obvious that the doctrine of adverse possession affected the minds of the trial chairperson in her decision.

I therefore agree with the learned advocate for the appellant that it was wrong for the trial chairperson to apply the doctrine of adverse possession in the circumstances of this case.

This is because, the parties did not rest since the alleged trespass by the respondent into the dispute shamba.

They were in various cases at various authorities in respect of the dispute land. The at once were in the village Council, at the family level, at the Primary Court and the District Court.

Even the respondent admitted in evidence that since 2003 they started cases between them. He stated at page 25 of the proceedings that he started to plant the trees in the dispute shamba in 2003;

'I started to planting trees in year 2003'

In the same year as he planted the trees they started suing each other;

'The applicant trespassed to my land in 2003 and I sued in the village land'

Also, at page 27 thereof;

'The applicant claimed land in 2003'

Thereafter followed criminal cases up to 2013 when it turned into a land dispute in 2014. Therefore, there was no peacefully enjoyment of the dispute land by the respondent for the doctrine of adverse possession to apply.

Again, the respondent did not claim possession by way off trespass but by exchange. In that respect the doctrine of adverse possession could have not been applied because the same is applicable only when the suit land has been obtained by trespass without any color of right.

In the case of ***Jumanne Chimpaye versus Daudi Mohamed Nkwaje (Administrator of the estate of the late Mohamed Nkwaje, Misc. Land Appeal No. 4/2020*** High Court at Kigoma, quoting the case of ***Nuru Kifundawili versus Wema Salumu, Misc. Land Application No. 134 of 2019*** I held that adverse possession is not applicable where the title over the dispute land is alleged to have been acquired by

purchase (for this matter; by exchange) despite of the long stay it might be on the dispute land.

I further held that in that respect it is the purchase which is to be established. In the like manner, in the instant case as title over the dispute land was claimed by the respondent through exchange agreement, it was the alleged exchange to be proved and not the long stay. See also the case of ***Registered Trustees of Holy Spirit Sisters Tanzania versus January Kamili Shayo and 136 others, Civil Appeal No. 193 of 2016 (CAT)*** at Arusha.

As I have ruled in the first ground the alleged exchange was not proved and therefore the respondent's averment are bare allegations, untruth and not reliable. To the contrary it is the appellant's evidence which was heavier and reliable than that of the respondent.

I accordingly allow this appeal with costs. It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA

JUDGE

28/10/2021

Court: Judgment delivered this 28th day of October, 2021 in the presence of both parties in person and their respective advocates; M/S Elizabeth Twakazi and M/S Joyce Godfrey respectively. Right of further appeal to the Court of Appeal of Tanzania subject to the guiding laws and rules is hereby explained.

Sad: A. MATUMA

JUDGE

28/10/2021