

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB - REGISTRY OF MUSOMA**  
**AT MUSOMA**

**MISCELLANEOUS LAND CASE APPEAL NO 22 OF 2021**

*(Arising from Land Appeal No 21 of 2020 from the District Land and Housing Tribunal for Tarime, Originating from Land Case No 17 of 2018 from Mkoma Ward Tribunal)*

**WILKISTA D/O A. OYAYA.....APPELLANT**

**Versus**

**JERUSA D/O E. NYANG'ORO ..... RESPONDENT**

**JUDGMENT**

*14<sup>th</sup> September & 8<sup>th</sup> October, 2021*

***Kahyoza, J.:***

**Jerusa E Nyang'ori** (Jerusa) sued **Wilkista Oyaya** (Oyaya) for invading the land owned by the family of **Nerea E. Nyang'oro** before the Ward Tribunal. **Wilkista Oyaya** won the case and **Jerusa E. Nyang'oro** appealed to the District Land and Housing Tribunal (**DLHT**). The **DLHT** heard the appeal and decided in the favor of **Jerusa E. Nyang'oro**. Aggrieved, **Wilkista Oyaya** appealed to this Court with three ground of appeal which reads as follows:-

1. That the appellate, chairman erred in point of law in relaying on uncertain, unsatisfactory and unproved evidence in deciding on the time limit without paying attention that, the appellant had neither slept on his right nor abandoned the disputed land from the date of acquiring and is the one who has developed the disputed land.
2. That, the chairperson erred in law to declare that the respondent, who is an administrator of the estate, the lawful owner of the

disputed land.

3. That, the chairperson erred in point of law for failing to analyze critically the contradictory evidence adduced before the ward tribunal by the respondent.

The ground of appeal raised the following issues to be determined by this Court:-

1. Was the appellate tribunal justified to apply the doctrine of adverse possession?
2. Was it proper to declare the administrator of estate to be the owner of the disputed land on his personal capacity?

The Court heard the appeal orally. During hearing both parties enjoyed the service of learned advocates, the appellant enjoyed the service of Ms. Rachael Onesmo while the respondent enjoyed the service of Mr. Paul Obwana. Mis Rachel abandoned the third ground of appeal.

A brief background is vital in order to appreciate the decision in this case, which is that: Nerea E. Nyang'oro moved from Raranya Village to Mkoma Village for the medical treatment of the appellant. She moved to Mkoma village to stay closer to the hospital. Neria E. Nyang'oro requested Abdallah Kimbo for a piece of land to grow crops. Abdallah Kimbo allowed Nerea E. Nyang'oro to use the land. It is also on record that Abdallah Kimbo reported to the village leadership that he has allowed Nerea E. Nyang'oro to grow crops to his land. Samwel Ondochi Tagaya, Jerusa's witness, who was the village secretary of Mkoma, deposed that;

*"Ndugu Kimbo aliniambia amekuja kwangu kuthibitisha huyu mama Nerea F. Nyang'oro Ofisini kwetu kwamba katika eneo langu ninapoishi nimempatia huyu mama Nerea F. Nyang'oro **awe analima** mimi nafanya shughuli za kuvua huko ziwani."*

Oyaya on his part alleged that Abdallah M. Kimbo sold the land to

Oyaya in 1986 and the disposition was witnessed by the chairman of the village and members of village land committee. In 2002, the appellant started to develop the said land and later in 2008 occupied the land in dispute. This allegation was supported by Jerusa's witness Ladis Ouda Mbere. Ladis Ouda Mbere replying to the question asked by the chairman of the ward tribunal stated that:-

**"Swali:** Shahidi huyo Mama Salome alianza kulima lini na lini aliacha kulima na Wilkisi Oyaya alianza kulima eneo lini na kaucha kulia lini?

**Jibu:** Mama Salome alianza kulima hilo eneo mwanzo mwa mwaka 1990 mpaka mwaka 2010. Mama Wilkista Oyaya alianza kulima hilo eneo mwaka 2010 mpaka akajenga nyumba yake ya kuishi"

In 2018, the dispute arose between Oyaya and Benaya E. Nyang'oro. Oyaya sued Benaya E. Nyangoro for trespass. Oyaya won the case. The ward tribunal demarcated the land. Later, Jerusa decided to apply for letters of administration of the estate of Nerea E. Nyang'oro vide Prob. No. 25/2018. After, the primary court appointed Jerusa the administrator of the estate of Nerea E. Nyang'oro. Jerusa, the administrator of the estate of Nerea E. Nyang'oro sued Oyaya for trespassing to the land Oyaya won a case against Jerusa's brother Benaya E. Nyangoro.

I wish to state, with all due respect, that I will not reproduce the submissions of the learned friends at this stage. I will consider the submission when answering the issues.

**Was the appellate tribunal justified to apply the doctrine of adverse possession?**

Oyaya complained in the first ground of appeal that the **DLHT** erred

in law to hold that Jerusa acquiring title to disputed land after using the land for long time. The **DLHT** held that as the appellant used the disputed (land) for more than 39 years for that reason it allowed the appeal.

Ms. Rachel, Oyaya's advocate, submitted that the respondent did not acquire land by adverse possession as decided by the DLHT. Jerusa testified that they acquired disputed land from long use. They used the land from 1979 without any interference. Oyaya's advocate submitted that in order to acquire land by adverse possession the condition stated by the Court of Appeal in the case of **Bhoke Kitangita V Machumu Mahemba**, Civil Appeal No 222/2017 must be proved.

The appellant's advocate submitted that the owner of the disputed land did not abandon the land that's why Jerusa's mother requested to use the disputed land. Jerusa's mother did therefore not acquire good title over the disputed land. The appellant's advocate contended that Oyaya, her client bought the said land and she has been in occupation since 1986. The appellant counsel further submitted that the Ward tribunal found that the appellant was in occupation of the disputed when it visited the *locus in quo*. Oyaya developed the disputed land by erection two houses and toilets to the ward tribunal.

Replying to the first ground of appeal, Mr. Obwana, Jerusa's advocate submitted that the DLHT was collect to hold that Jerusa, the respondent was the rightful owner of the land in dispute. He was of the position that Nerea E. Nyang'oro acquired land in 1979 and that fact was not disputed as per evidence of Jerusa's witnesses tendered before the Ward Tribunal. He submitted that the witnesses were not cross examined regarding the piece of evidence that Nerea E. Nyang'orro acquired the land in 1979. He contended that failure to cross-examine implies that the fact was admitted. To bolster his argument, he cited the case of of **Ismail**

**Ally V R** Criminal Appeal No 312/2016.

Mr. Obwana, the respondent's advocate argued that the case of **Bhoke Kitangita** (Supra) supported his client's position on the ground that the respondent occupied the disputed land from 1979 up to 1986 the year the appellant allegedly bought the disputed land. He submitted that there no evidence that Oyaya occupied the land after he bought. The evidence is that he started building the house in 2002, which he completed in 2008. He submitted that 17 years passed from 1979 up to 1986 and that 1986 up to 2002 16 years passed, thus, even if the Jerusa did not obtain land from its owner by occupying it for more than 16 years Jerusa acquired it by adverse possession.

In addition, Mr. Obwana contended that Oyaya complained for first time in 2018, three year after the death of Nerea E. Nyang'oto. Nerea E. Nyang'oto died in 2015. He prayed to this Court to consider the position of the law in **Shaban Nasoro V Rajabu Simba** [1967] HCD 233, where it was stated that the courts have been reluctant to disturb persons who have occupied land and develop it for long time. The respondent occupied the land for 39 years without disturbance and therefore the principle of adverse possession favored his client, Jerusa.

I have gone through the rival submissions and I found out that the issue is whether Jerusa's mother Nerea E. Nyang'oto acquired title to the disputed land by adverse possession. The doctrine of adverse possession allows a person who is in possession of a piece of land against the wishes of the owner for an uninterrupted given period, which according to section 3(1) of the Law of Limitation Act, Cap. 89 [R.E 2019] read together with item 22 of Part I of the Schedule of the same Act is twelve years, to become the owner of that land. A person claiming to acquire land by adverse possession, to succeed, must establish factors considered by the

Court of Appeal in **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016, CAT (unreported) which quoted with approval the Kenyan case of **Mbira v. Gachuhi** [2002] E.A. 137 (HCK) in which again, reliance was made on the cases of **Moses v. Lovegrove** [1952] 2 QB 533 and **Hughes v. Griffin** [1969] 1 All ER 460. The Court of Appeal held that:-

*"On the whole, a person seeking to acquire title to land by adverse possession has 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 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 animus possidendi;*
- f) That, the statutory period, in this case twelve years, had elapsed;*
- g) That, there had been no interruption to the adverse possessor through the aforesaid statutory period and*
- h) That, the nature of the property was such that in light of the foregoing, adverse possession would result.*

The evidence before the ward tribunal depicts that Jerusa, the respondent admitted that Nerea E. Nyang'oto, their mother was given the

disputed land by their neighbors Abdallah Kimbo Kimbo for cultivating it or say for growing crops in 1979. Jerusa testified that "*Ndipo walianza kutupatia eneo la ardhi kwa ajili ya shughuli za kilimo.*" This piece of evidence was supported by the evidence of Jerusa's witnesses Samwel Ondoch Tagaya whose evidence was that:-

*"Ndugu Kimbo aliniambia amekuja kwangu kuthibitisha huyu mama Nerea F. Nyang'oro Ofisini kwetu kwamba katika eneo langu ninapoishi nimempatia huyu mama Nerea F. Nyang'oro **awe analima** mimi nafanya shughuli za kuvua huko ziwani."*

Another witness was Ladis Ouda Mbere, a ten cell-leader of the area where Abdallah Kimbo lived, deposed that "*Kimbo alimpa eneo lake kwa ajili ya kilimo mwaka 1979. Kimbo alimpa eneo hilo **ili alime mazao mbalimbali ya chakula***". Ladis Ouda Mbere replied to question asked by Wilson E. Awuor, the chairman of the ward tribunal confirming that Oyaya was in occupation of the suit land even before 2018. She stated that:-

**"Swali:** Shahidi huyo Mama Salome alianza kulima lini na lini aliacha kulima na Wilkisi Oyaya alianza kulima eneo lini na kaucha kulima lini?

**Jibu:** Mama Salome alianza kulima hilo eneo mwanzo mwa mwaka 1990 mpaka mwaka 2010. Mama Wilkista Oyaya alianza kulima hilo eneo mwaka 2010 mpaka akajenga nyumba yake ya kuishi.

It is undisputed fact, given the above evidence, that Nerea E. Nyang'oro did not have title to the land she was given for farming. She was allowed to grow various food crops. In short, the totality of the evidence on record depicts that; **one**, Nerea E. Nyang'oro, the respondent's mother was licensed to use the land for farming; **two**, the

owner of the disputed land permitted Nerea E. Nyang'oro, to enter onto the disputed land; and **three**, the respondent entered to the land with consent of the owner of the land. Thus, Nerea E. Nyang'oro, the respondent's mother never used the land against the will of the owner. In other words, Nerea E. Nyang'oro, the respondent's mother, did not ***openly and without the consent of the true owner, Mr. Abdallah Kimbo do acts which were inconsistent with the enjoyment by the true owner, Mr. Abdallah Kimbo, of land for purposes for which he intended to use it.*** Nerea E. Nyang'oro was licensed by the true owner, **Mr. Abdallah Kimbo** to use the land. **Mr. Abdallah Kimbo** made sure the villager leadership is informed and involved he took Nerea E. Nyang'oro to the village secretary Samwel Ondoch Tagaya. He made it express that "*eneo langu ninapoishi nimempatia huyu mama Nerea F. Nyang'oro awe analima mimi nafanya shughuli za kuvua huko ziwani*" meaning "*I have given my land to this lady for farming*". A licensee cannot acquire land by adverse possession. Thus, doctrine of adverse possession cannot be applied in favour of Jerusa for reasons stated above.

In the instant case, Jerusa's mother, Nerea E. Nyang'oro, was authorized by **Mr. Abdallah Kimbo**, the owner of the land to use the land for farming. Jerusa's mother, Nerea E. Nyang'oro was therefore, an invitee, and it is trite law that an invitee cannot claim adverse possession over the host. This position was established in the case of **Mukyemalila & Thadeo Vs. Luilanga** [1972] HCD 4 where it was held that:-

*"An invitee cannot establish adverse possession against host even if the invitee had made the permanent improvement."*

Jerusa's mother, Nerea E. Nyang'oro never obtained title to the disputed land which Jerusa claimed as the administrator of the estate of Nerea E. Nyang'oro. Jerusa's claim for the disputed land lacks the ground

to stand on. The administrator of deceased's estate steps into the shoes of the deceased, he or she cannot have a title better than what the deceased had. The disputed land is not and it has never been part of the estate of Nerea E. Nyang'oro. I wish to conclude my finding to the first issue by quoting the position of law regarding adverse possession from the decision of the Court of Appeal in **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others** (supra), which applies squarely to the present case:-

*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.***

*To this proposition, we find inspiration from the Kenyan case of **Mbira v Gachuhi** [2002] 1 EA 137 (HCK) wherein it was held: -*

***"The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises; if the occupiers right to occupation was derived from the owner in the form of permission or agreement; it was not adverse"** (emphasis is added)*

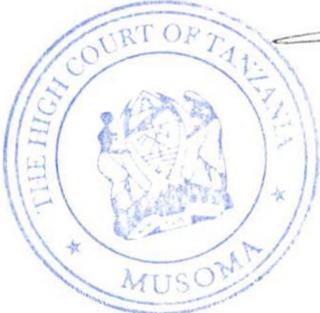
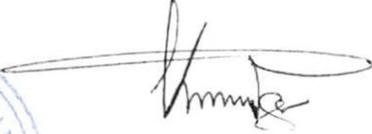
**Was it proper to declare the administrator of estate to be the owner of the disputed land on his personal capacity?**

Oyaya complained in the second ground of appeal that the DLHT erred in law to declare that Jerusa, the respondent, who is an administrator of the estate, the lawful owner of the disputed land. The appellant's advocate submitted that DLHT declared that Jerusa was the owner of the land in his personal capacity. Given the finding to the first

issue that the respondent has no bases to claim title over the disputed land, I see no reason determine the second issue. The determination of the first ground of appeal embraces the second ground of appeal.

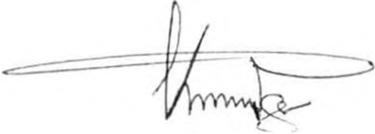
In fine, I allow the appeal, set aside the decisions of the District Land and Housing Tribunal, and uphold the decision of the Ward tribunal. The appeal is allowed with costs.

It is ordered accordingly.



**J. R. Kahyoza**  
**JUDGE**  
**8/10/2021**

**Court:** Judgment delivered in the in the presence of Ms. Rachel Onesmo, the appellant's advocate and Mr. Obwana, the respondent's, virtually. B/C Ms. Millinga.



**J. R. Kahyoza**  
**JUDGE**  
**8/10/2021**