IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND APPEAL NO. 02 OF 2019

(C/F Arusha District Land and Housing Tribunal Application No. 64 of 2012, c/f Misc. Land Application No. 108 of 2018)

NANCY WILSON MBISE..... APPELLANT

(Suing as Administratrix of the estate of the late Wilson Masare Mbise)

Versus

GEOFREY WILFRED MBISE..... RESPONDENT

(Legal Personal representative of the late Josephine Wilfred Masare)

JUDGMENT

28th June & 03rd Sept, 2021

MZUNA, J.

Nancy Wilson Mbise has instituted this appeal against Geofrey Wilfred Mbise. She is challenging the verdict of the Arusha District Land and Housing Tribunal which adjudged that the disputed suit land measuring about 3/4 acre located at Pori, within Arumeru, in Arusha Region belongs to the said Geofrey in his capacity as an administrator of her late mother's estate, Josephine.

The facts giving rise to this appeal is not far to seek. Nancy and Geofrey share the same grandfather Masare Mbise. Nancy was born by Wilson whereas Geofrey was born by Wilfred, the husband of the late Josephine (respondent's mother). Wilson and Wilfred were brothers along with other brothers Elisa, Alfred

and Simon. Wilson, the appellant's father Wilson, passed away on 25th December, 1972 whereas Masare Mbise (the appellant's as well the respondent's grandfather) passed away in 1989.

The appellant's claim of the suit land is based on the fact that it is among the two plots of land which were given to the appellant and his young brother Richard (who passed away in 2005). One plot was under the care of Alfred and another was under the care of Wilfred, pending when Nancy and Richard were grown up. Indeed, Alfred handled the plot to the appellant whereas Wilfred never handled it, instead it was given to Geofrey, his son despite the protest from other brothers including Alfred. It is the plot now in dispute which the appellant says the appellant's father was a mere caretaker. It should be handled to her.

On the part of the respondent he says, the plot was inherited from his late father Wilfred. He had been in continuous use from 2000. He had built a house thereon as well as banana plants and trees. That, the appellant was given one plot which she sold to the son of Elisa Mbise (AW2), one Osward. He says if the appellant had her claim why not claim it during the livelihood of his late father Wilfred.

The appellant's case is based on the point that limitation period cannot count because the appellant's father was a mere overseer. As opposed to that view, the respondent raised a point of limitation period that he had been in continuous use and a house being erected thereon for more than 12 years. It is his late father and

mother who were taking care of their grand mother and grand father whereas the appellant's father, a Government employee was staying at Moshi.

The Chairperson of the District Land and Housing Tribunal found in favour of the respondent for the reason that the appellant's father was allocated one plot of land. It is the same land which the appellant sold in 1995 after being handled it by clan leaders. Under normal circumstance, the Tribunal held, if she had any claim on the second plot, the appellant ought to have claimed it in 1995 when she claimed for the other plot. It was implied that she acquiesced to the respondent's occupation.

Aggrieved, the appellant has challenged the Arusha District Land and Housing Tribunal judgment and preferred this appeal on the following grounds:

1. *That, the District Land and Housing Tribunal erred in law and in fact in holding that the appellant had no claim on the suit land as she has already been given a piece of land as inheritance and dispose of the same.*
2. *That, the District Land and Housing Tribunal erred in law and in fact in making a decision for the respondent against the weight of reliable testimony of the appellant and her witnesses.*
3. *That, the District Land and Housing Tribunal erred in law and in fact in basing its decision on weak, contradictory and conflicting testimony of the respondent and her witnesses.*
4. *That, the District Land and Housing Tribunal erred in law and in fact in confirming the respondent claim to the suit land without proof of being the legal personal representative of the original owner.*

5. *That, the District Land and Housing Tribunal erred in law and in fact in basing its decision on the mere issue of occupation and development of the suit land.*

The appeal was heard by way of written submissions whereas the appellant filed the submission drafted by herself and the respondent preferred the service of Mrs Christina Y. Kimale, the learned counsel.

I propose to dispose of this appeal based on the following four issues. Let me start with the first, whether the respondent has a *locus standi*? This issue is derived from the fourth ground of appeal whereby the appellant says, the respondent cannot claim the suit land without letters for appointment as legal personal representative of the original owner. This question according to the appellant emerged because there is no proof that the land in dispute was allocated to his late father

In response, Ms. Kimale, the learned counsel said that the land in dispute was originally owned by the appellant's and respondent's grandparents and land given to the respondent was owned under the Meru customary law by the respondents' parents. Upon death of one of them the land remains to the surviving parent, thus no need for the respondent mother to petition for letters of administration.

This point should not detain me. The appellant never raised it at the trial tribunal. It is not proper to raise it on appeal. That omission notwithstanding, still,

as well argued by Ms. Kimale, even the appellant was given possession of the first plot without letters of appointment based on customary land acquisition where the requirement of one being the legal personal representative though most preferred but has not always been a prerequisite condition. The appellant herself claimed to have been bequeathed land by her grand mother even without letters of appointment from her grand mother, let alone the said grand mother having not been legal personal representative of Masare Mbise who is the original owner. I see no reason to apply it at this moment. This ground fails.

I revert to the second issue. The question to ask is whether the suit land is the same and one plot as the one which was given to the appellant and then sold it?

Submitting on the 1st ground of appeal, the appellant stated that it was wrong for the trial tribunal to base its decision partly on the allegation by the respondent that the appellant is not entitled to the suit land as her inheritance as a parcel of land had already been given to her and she disposed of the same. She says, there is nowhere that she disputed to have been given a parcel of land and then sold it. The claim is on the second parcel of land which the respondent refused to hand over. That it is the plot which her witnesses Elisa Michael Mbise, Simon Masare Mbise and Tikisaeli Masare Mbise had testified in respect of the suit land. It is the one in dispute which was left to Wilfred as a caretaker.

In response, Mrs Kimale argued that, the appellant at the trial court testified that she was shown a farm and not farms of the deceased as well supported by the evidence of AW2 and one Simon Mbise Masare. She insisted that it was only one farm that was given to the appellant for inheritance. That the appellant's claim on the 2nd farm is based on a will that was not even tendered or admitted as evidence on record.

This court has keenly followed the submission from both parties. The issue the way I see is based on reliability and credibility of witnesses. It has been held time without number that the trial court is better placed to assess the credibility of witnesses because it had the advantage to see and asses the demeanour credibility of witnesses than the appeal court which reads only a transcript of the record. When AW1, the appellant was cross examined by Mrs Kimale, she admitted that her father had inherited one farm. That plot I dare say is the same plot which AW2 Elisa Mikael Mbise said was given to the appellant from her grandmother Ndekaliswa, which he said it is besides that of the respondent. I find no reason to find otherwise for reasons I will demonstrate later. It was one and same plot which the appellant sold it. The proceeds was used to construct her house at Arusha.

Now to the third and fourth issues, that is whether the respondent's evidence was contradictory and who as between the appellant and respondent has the right to own the disputed land.

The appellant has argued that the respondent's evidence is contradictory based on the years he was allocated that farm. Was it given to him in 1996 as stated by her mother Josephine (RW1) or 2000 as stated by RW3, the respondent. That, the evidence of the appellant at trial Tribunal was first hand evidence, straight forward with no contradictions since the witness were all sons and daughters of the late Mzee Masare Mbise hence reliable as opposed to the respondent's evidence which was filled with weakness, contradiction and conflicts as first it was adduced by a person not related to the Mbise Clan but rather the respondent maternal side.

Mrs Kimale opted to consolidate ground No.2 and 3. She says the appellant claims no land to the respondent as she was given farm allocated to her in 1995. That, there was another land she would have claimed it in the same year or if the respondent was a care taker then, ought to be in writing or orally and there should be witnesses. That, the appellant was allocated her father's land without prior petitioning for the letters of administration but later after the lapse of 16 years she comes back claiming for another land under the umbrella of an administratrix.

She said that the respondent evidence was more reliable. She pointed that it was the appellants evidence which was with more inconsistences and contradictory because in her pleadings never disclosed to have inherited two farms from her deceased father. That, the farm she claimed, she stated that it was given to her by her grand mother without evidence. She moved the court to find based

on section 110 of the Evidence Act Cap 6 R. E 2002 that the burden of proof lies on the appellant to prove that she inherited two farms which had not been proved.

In answering as to when the disputed land been allocated to the respondent RW1 stated to be 1996 as opposed to RW 4 who claimed it was in 2000. This contradiction does not in any way disprove the fact that the land in dispute was first built a foundation, then a building. That was done some more than 12 years ago. The appellant had no written documents showing that she protested such development. Currently, there are banana plants and trees which were planted by the respondent. The appellant said there was a move to convene a meeting after the death of the respondent's father but it was not conducted. The point is, where did she complain about that plot which had been developed even before the death of the respondent's father?

There is also an allegation that the appellant had brought reliable witnesses who are of the Mbise clan as opposed to the respondent's witnesses. In my view, the said witnesses could have been more reliable if the matter was filed during the livelihood of their brother, the respondent's father. One wonders why is it that the matter was lodged after his death. The allegation that the appellant was busy looking for letters of appointment as the administrator of the late Wilson estate are mere flimsy reasons. I tend to agree with Josephine, the respondent's mother (deceased) who said that they (her brothers in law) have decided to team up

against her in order to deprive her and her children, their rights. This court cannot condone it.

Now, on the merits of the appeal. This court agree entirely with the respondent that this suit was filed beyond the prescribe time limit of 12 years. It was held in the case of **Nassor Uhadi v. Musa Karunge** [1982] TLR 302 that,

"Where a person occupies another land over a long period and develops it and the owner knowing acquiesces such a person acquires ownership by adverse possession,"

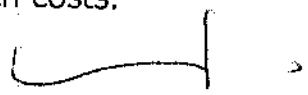
The respondent acquired title by the doctrine of adverse possession. He inherited the said land and developed. The lapse and inaction by the appellant is a proof that the suit land was never inherited from the late father/grandmother. It is a settled principle of law that a person who occupies someone's land without permission, and the real owner knowingly but does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession.

It was held in the case of **The Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo & 136 Others,** Civil Appeal No. 193/2016, CAT at Arusha (unreported), at 24 that:-

"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 occupier's right to occupation was derived from the owner in the form of permission or agreement, it was not adverse."

There is no proof that the ownership of the respondent was a mere overseer as alleged by the appellant. He acquired title through inheritance from his father and mother as well as by adverse possession. For that reason, this appeal fails.

Appeal stands dismissed with costs.



M. G. MZUNA,

JUDGE.

03/09/2021