

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

MISCELLANEOUS LAND APPEAL NO 50 OF 2021

(Originated from Land Appeal No. 7 f 2018 in the District Land and Housing Tribunal of Tarime at Tarime, Original Land case no.7 of 2018 of Kirogo Ward Tribunal)

OKECH NYOBURA APPELLANT

VERSUS

SAMWEL ORWARU MALAKI RESPONDENT

JUDGMENT

10th September & 18th October, 2021

F.H. MAHIMBALI, J.:

The appellant Okech Nyobura is aggrieved by the decision of the DLHT of Tarime in its appellate jurisdiction which reversed the decision of Kirogo Ward Tribunal by declaring the respondent as lawful owner of the land in dispute.

Originally, the appellant won the case at the trial Ward Tribunal in a dispute filed by the respondent. Dissatisfied, the Respondent successfully appealed to the DLHT of Tarime which decision aggrieved the appellant, thus the basis of this appeal to this Court.

The brief facts of the case can be stated this way. The respondent being in occupation and use of the land in dispute since in 1972, was

astonished to find the appellant having invaded the said land and started construction of two houses in a supersonic speed. It is alleged that the appellant's father was once invited by the respondent's father/using the land in dispute sometimes back in 1962 before he shifted to another place in 1972. Since then, the respondent has been in full occupation of the said land in dispute until in 2016 when the appellant returned and assumed possession of it claiming that the land belongs to his deceased father as he had been in full occupation of it prior to 1972.

On the other hand, the appellant is alleging that the land in dispute is sure belongs to his deceased father who was in occupation of it since 1962 while himself was born in 1972. He was born there and knows that the said land belongs to his father since then. Upon their transfer in 1972 following operation vijiji, the land remained theirs. His father died in 1995 and since then the land fell to him and when he returned to it in 2016, he was not in invasion but rather he regained possession of their original land belonging to their father.

Upon hearing the parties and their witnesses, the trial tribunal decreed the appellant as lawful owner of the said land in dispute. The respondent then successfully appealed to the DLHT where upon evaluating the trial tribunal's evidence in record, reversed the decision of

the trial tribunal and decreed that the respondent the lawful owner of the land in dispute. The reason why the DLHT reversed the decision of the trial tribunal is on the reason that the evidence on trial tribunal record established that the appellant had no good title over the said land in dispute over the respondent. The appellant's father being a mere invitee by the respondent, there was no way he could acquire good title over it in ownership so long as he remained an invitee. Moreover, as he abandoned that land since his shift in 1972, there was no way he could claim possession of it in 2016 after the same had been in full ownership and use by the respondent considering the principle of adverse possession. This aggrieved the appellant, thus the basis of this appeal to this court on the following grounds of appeal: -

1. That, the first appellate tribunal erred in law and fact for failure to observe that the respondent instituted a suit in the trial tribunal without locus standi.
2. That, the first appellate tribunal erred in law and facts for failure to consider that there was no any evidence to prove that the Respondent is the owner of the land in dispute.
3. That, the first appellate tribunal wrongly interpreted the doctrine of adverse possession and he never consulted the proper law hence he made a wrong decision.

4. That, the first appellate tribunal erred in law and in fact by holding that the respondent became owners of the suit land by virtue of adverse possession while there was no evidence that they were adverse possessors of the disputed land.
5. That, the first appellate tribunal erred in law and fact by holding that the respondent was not the trespassers on the disputed land.
6. That, the first appellate tribunal erred in law and in fact by failing to evaluate the evidence in records thus he made a wrong decision of the disputed land.

Basing on these grounds of appeal, the appellant is praying before this court for the following orders:-

- a) This appeal be allowed with costs
- b) This Honourable Court to uphold the decision of the trial tribunal.
- c) This honorable court to declare that the appellant is the lawful owner of the disputed land.
- d) Costs of this appeal be borne by the respondent.
- e) Any other relief this honorable court may deem just and fit to grant.

In digest to all these six grounds in the petition of appeal, they all bowl into one main ground: who between the two is the rightful of the disputed land. Is it the appellant or the respondent.

During the hearing of the appeal, the appellant fended for himself whereas the respondent was represented by Mr. Onyango Otieno, learned advocate.

The appellant who was unrepresented, just prayed that his grounds of appeal be adopted to form part of his appeal submission. He added a little that as he has was born in the same land, grew and lived there all the time with his parents and relatives, he wonders why then the respondent is made the owner of the said land against him.

Conversely, Mr. Onyango learned counsel for the respondent argued the appeal generally by submitting that as per evidence in the trial tribunal record, there is no basis why the appellant can be declared the owner of the said disputed land. The reason is simple that, they vacated the said land for a long time, so they left it unattended for quite a long time. The law is very clear on this position. Considering the fact that the respondent is older than the appellant age wise, the respondent has lived in the said land for more years than the appellant. In any way, the evidence in the trial tribunal record does not support the appellant in

any manner save a trespasser only. So long as he is a trespasser to that land, he shall merely remain so.

Referring this court to the case of **Maigu E. M Magenda Vs. Arobogast Magenda**, Civil Appeal No. 218 of 2017 (2018 TZCA), also **Musa Hassani V. Barnaba Yohana Shadapha**, Civil Appeal 101/2018 (2020 TZCA) where it was held that an invitee cannot possess land in which he was invited even if he has exhaustively improved it, he shall always remain so. With this case, Mr. Onyango the learned counsel submitted that so long as the father of the appellant was just invited in that land by the respondent, there was no way the appellant could become the owner of it against the respondent either adversely or otherwise unless his father had legally acquired. Otherwise, there is no plausible explanations or evidence how the ownership of it passed to the appellant's father and subsequently to the appellant. In the circumstances, as the appellant is just less 50 years old against the respondent who is over 70 years old, his claim of ownership of that land is unexplainable. Thus, he prays for the appeal be dismissed with costs.

In his rejoinder submission, the appellant reiterated his submission in chief that the land in dispute is theirs. His father had been occupying the said land since 1962. Himself was born in 1972 but his father died in

1952. He humbly prays that this appeal be allowed with costs as the land in dispute is his.

I have dispassionately gone through the submission of both sides and trial tribunal's records, the vital issue for determination here is whether the appeal is meritorious.

The evidence in record is descriptive that the appellant's father was just an invitee to the said land owned by the Respondent. Upon their shift in 1962, the land reverted back to the owner (Respondent). This is as per testimony of Faustine Sasi Onditi, the appellant's witness at the trial tribunal. The evidence of the appellant himself is not so descriptive and worth of credit in determining ownership of the land to the appellant. This is because, as per his testimony, he is born 1972. He was born in the same land and as he is grown up there, he knows that place/disputed land as belonging to his deceased father who died in 1995. Knowing that the land is theirs, upon the death of his father he decided to return to that land where then this dispute arose.

As per available evidence in record, it is clear that the one who is conversant with the said land is the appellant's father and not the appellant himself. Since the father is now deceased, his properties including the alleged land in dispute does not automatically vest to the appellant upon demise of his father. He had to follow the requisite legal

procedures governing probate matters so that he assumes ownership of it. A mere assumption that he is the owner of it in the absence specific legal grantis not permissible. In the case of **MALIETHA GABO vs ADAMU MTENGU** miscellaneous Land Appeal no. 21 of 2020 my learned brother, I. C. Mugeta, J cited the case of **MGENI SEIF V. MOHAMED YAHAYA KHALFANI** , Civil Application No. 1 / 2009, Court of Appeal – Dar es Salaam (unreported) where at page 14 , it was held :

"As we have said earlier, where there is a dispute Over the estate of the deceased, only the probate and administration court seized of the matter can decide on the ownership".

Additionally, on page 8 of the cited case of the Court of Appeal had this to say;

"It seems to us that there are competing claims between the applicant and the respondent over deceased person's estate. In the circumstances, only a probate and administration court can explain how the deceased person's estate passed on to the beneficiary or a bona fide purchaser of the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letter of administration, where the deceased died intestate or probate, where the deceased passed away testate".

Thus, before the appellant had invoked his legal rights on ownership of the said land, he ought to have established first whether

he had a good title of it. Being a mere son of the deceased, does not automatically grant him with right of ownership over the said land alleged to be owned by the appellant's father.

Secondly, assuming that the said land belonged to the appellant prior to their shift to another village, as they left that land unattended during all that time (over 20 years), the legal position is settled. The Court of Appeal of Tanzania 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 it was held that:-

"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

That the nature of the property was such that, in the light of the foregoing, adverse possession would result.

A person seeking to rely on the principle of adverse possession has establish the factors stated in the above case cumulatively. In the case at hand, I am convinced satisfactorily that the first appellate tribunal applied the principle of adverse possession against the appellant very well. It being the first appellate tribunal, in my clear digest re-appraised, re-assessed and re-analysed the evidence on the trial record and arrived at a correct position of the law. See the case of **Siza Ptrice V. Republic** Criminal Appeal No. 19/2010 (CAT – unreported) where the Court stated:

“We understand that it is settled law that a first appeal is in the form of rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. We respectively hold that this was not done”.

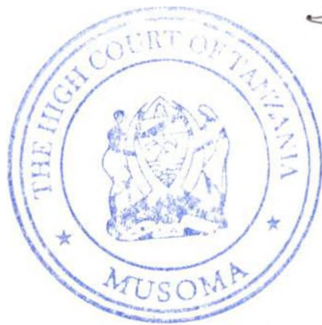
In totality of the trial court’s evidence and the verdict by the DLHT in its first appellate jurisdiction, the reversal of the trial tribunal’s verdict was justified. So long as his father remained an invitee to that land,

there was no time that status changed to being owner of it. Coupled with the shift to another village, the subsequent return sometimes later after a lapse of more than 20 years, he was equally barred by the common law principle of adverse possession.

I consider this appeal bankrupt of any useful merit, the same is hereby dismissed with costs.

It is so ordered.

DATED at MUSOMA this 18th day of October, 2021.




F. H. Mahimbali

JUDGE

18/10/2021

Court: Judgment delivered this 18th day of October, 2021 in presence of the appellant, Mr. Onyango Otieno, advocate for the respondent and Miss Neema P. Likuga – RMA.

Right of appeal is explained.


F. H. Mahimbali

JUDGE

18/10/2021