IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

LAND APPEAL NO 39 OF 2021

(Arising from the judgment of the District Land and Housing Tribunal for Tarime at Tarime, Application No. 02 of 2020 dated 9th April 2021)

AGER ONDIEK ..... 1ST APPELLANT

ODIRA OBAYE.....2ND APPELLANT

VERSUS

MICHAEL OBIERO .....RESPONDENT

JUDGMENT

20th September and 12th November, 2021

F.H. MAHIMBALI, J.:

This appeal traces its origin from the decision of the trial tribunal (DLHT of Tarime at Tarime) in Land Application no. 2 of 2020 where the respondent successfully sued the appellants and the DLHT decreed the respondent as the lawful owner the suit land against the appellants.

The brief facts of the case can be summarized this way. That the respondent and the two appellants each claim ownership of land in a suit land at Mori village within Rorya District, in Mara Region. Whereas

the first appellant claims ownership of the said land as allocated to him by the village council land committee in 1984, the 2nd appellant claims that the suit land was allocated to his deceased father during Operation Vijiji in 1973/1974, therefore he legally owns it.

On the other hand, the respondent claims right of ownership of that land as the said land belongs to his deceased father since 1950s. Both the 2nd appellant and the respondents claim ownership of the said land as administrators of the estates of their deceased fathers.

According to the evidence in record, there is no much dispute between the first appellant and the respondent. The only controversy between them is that the respondent claims against the 1st appellant encroaching to the respondent's land beyond what was allocated to him by the village land council in 1984.

However, the main controversy is between the respondent and the second appellant. Whereas the respondent claims ownership of that suit land since 1950s as belonging to his deceased father, the second appellant on the other hand claims ownership of the said land in dispute from 1973/1974 during Village Settlement Scheme (Operation Vijiji).

Upon hearing the suit, the DLHT decreed the suit land lawfully owned by the respondent and therefore the appellants are trespassers. They should forthwith give immediate vacant possession of the land in dispute to the respondent. This decision did not please the appellants, hence the basis of the current appeal which is propped on ten grounds of appeal. However, in digest of the same, I have condensed them into one main ground of appeal that *"the trial tribunal erred in law and facts in declaring the respondent as the lawful owner against the appellants as per the evidence in record".* I say so because, there is no any legal issue raised/point of law pointed out in respect of the trial court's proceedings and all the grounds of appeal revolve around the issue of proof that the appellant's evidence is weightier than that of the respondent.

During the hearing of the appeal which was argued by way of written submissions, the appellants fended for themselves whereas the respondent enjoyed the legal services of Mr. Revocatus Baru, learned advocate.

In their joint written submissions, the appellants submitted that they are residents of Mori Village in Rorya District – Mara region they had acquired land under customary deemed right of occupancy in

1973/1974 during Village Settlement Scheme (Operation Vijiji). That the first appellant is the neighbour to the 2nd appellant. Whereas the first appellant was allocated 3.5 acres, the 2nd appellant's deceased father was allocated 2.5 acres. That the said land had been allocated to their deceased father the late Paulus Maranda since 1973/1974 during Operation Vijiji and had been in full occupation of the said land until in 2006 when their father untimely succumbed to death. Thereafter, the said land was temporarily inhabited by their nephew one George but later moved and left it unattended. It has been submitted that, in essence the suit land belongs to the appellants and not the respondent as alleged. It is their submission that as per DW3's evidence that the said land was allocated to the late Paulus Maranda since 1973/1974 during Operation Vijiji and had been in full occupation of the said land until in 2006 when he died, the continuing use by the 2nd appellant's heirs/administrators is legally justified as they accrued a lawful title of it.

On the other hand, the respondent disputes the said land to be lawfully acquired by the appellants as the evidence on record does not favour them. It is his submission that the trial DLHT rightly ruled in their favour. That their deceased father one Obiero Okinyi had been in occupation of the said land in dispute since 1950s and that the said late

Paulus Maranda was just temporarily allocated the said land by the late Obiero Okinyi. As the 2nd appellant's father died in 2006, the land then reverted back to the Respondent's father in 2006 who used it until 2012 when he died and the respondent became the supervisor of it as administrator. It has been further submitted that the fact that the 2nd appellant's father and other relatives being buried there is not a conclusive proof that the land belonged to their father. As the appellant's father died in 2006 and that during all that time the respondent was in full occupation and use of that land, then the 2nd respondent is barred by time of limitation invoking the principle of adverse possession.

Having dispassionately considered both parties' submissions, it is now up to this court to rule whether the appeal is meritorious.

In Tanzania, there are several ways in which a person can acquire land including allocation by the village council, or by grant of right of occupancy, purchase, inheritance and gift. In any of these ways, there must be proof of ownership of the said land. A mere allegation is not sufficient. The law is, who alleges must prove (section 110 and 111 of the TEA). The burden of proof regarding the question whether any person is the owner of anything to which he is shown to be in

possession, is on the person who asserts that he is not the owner (Section 119 of Tanzania Evidence Act). In this case, it was expected that the respondent should have established that duty at the DLHT that the appellants are not owners of the said land, the duty which the respondent failed to discharge. The allegation that Mr. Paulus Maranda was just temporarily allocated the said land by the late Obiero Okinyi is a fact of proof. That, he ceased his occupation upon his demise in 2006 is also a fact of proof. The respondent ought to have established evidence to that effect that the second appellant was just temporarily allocated the said land by the late Obiero Okinyi. So far there is no that proof in the trial tribunal record (DLHT).

Considering the fact that DW3 for the 2nd appellant at the trial DLHT testified how the said land was allocated to Mr. Paulus Maranda during the Village Settlement Scheme, though there is lack of documentary proof/evidence, yet his evidence seems to be credible, honesty and trustworthy in comparison to that of the respondent as it stands impeached. The argument and submission that the 2nd appellant is barred by the principle of adverse possession is equally baseless in the circumstances of this case. In law there can not be adverse possession where there is clear evidence of active use of the said land and there is

no proof of abandonment. The Court of Appeal of Tanzania in the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 others**, Civil Appeal No. 193 of 2016 held that for there to be adverse possession, the adverse possessor must establish 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 animo possidendi;*
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.*

A person seeking to rely on the principle of adverse possession has to establish the factors stated in the above case cumulatively. In the

case at hand, I am convinced satisfactorily that the principle of adverse possession cannot apply against the appellants.

Since in civil cases a fact is said to be proved when its existence is established by a preponderance of probability (section 3(2)b of the TEA), in this case the fact that the Respondent (Respondent's father) has been in occupation of the land in dispute since 1950s against the 2nd appellant's father, it was a fact of proof. None of respondent's witnesses at the trial tribunal (DLHT) established that fact. On the other hand, it has been legally established that through Village Settlement Scheme (Operation Vijiji) of 1973/1974, the said land was allocated to the 2nd appellant (see the testimony of DW3 and DW2).

The law is, both parties cannot tally. But whose evidence is heavier, is the one who must win (See **Hemed Said V. Mohamed Mbilu (1984) TLR 113 &114).**

In a further digest to the appeal by the first appellant, the record is clear that the respondent is not in contention against him. Therefore, appeal by 1st appellant equally succeeds.

In fine, the respondent is not having a good title of ownership of the land in dispute against the appellants as claimed for lack of proof.

This appeal succeeds. The decision of the trial tribunal in that vein is quashed and set aside for arriving at a wrong decision.

Costs to follow the event.

DATED at MUSOMA this 12th day of November, 2021.

F. H. Mahimbali

JUDGE

12/11/2021

Court: Judgment delivered this 12th day of November, 2021 in the presence of the appellant, Mr. Revocatus Baru, advocate for the respondent and Mr. Gidion Mugoa – RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

12/11/2021