IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 26 OF 2019

(C/F land Application No. 193 of 2009 in the District Land and Housing Tribunal of Arusha at Arusha)

MELIYO SANING'O.....APPELLANT

VERSUS

PAPAA KURESOI.....1ST RESPONDENT

KORDUNI PAPAA.....2ND RESPONDENT

JUDGEMENT

14/9/2021 & 10/12/2021

ROBERT, J:-

This appeal arises from the judgment and decree of the District Land and Housing Tribunal (DLHT) of Arusha in Application No. 193 of 2009 where the Appellant unsuccessfully sued the Respondents claiming ownership of a piece of unsurveyed land measuring seven (7) acres located at Enguiki Village, Monduli District in the region of Arusha.

Briefly stated, facts relevant to this matter reveals that, the appellant alleged to have been given the suit land by his late father

Saning'o Kosira in 1990 who died in October, 2000. For the whole time, the said suit land was used for grazing livestock. In 2009, the appellant filed an application at the DLHT alleging that the respondents had trespassed into his land and claimed ownership of it. After a full trial, the DLHT made a finding that the respondents had been in peaceful occupation and possession of the suit land for seventeen (17) years since 1992 until 2009 when the appellant filed the application. In the end, the DLHT decided in favour of the respondents and dismissed the case with costs. Aggrieved, the Appellant lodged this appeal armed with the following grounds;

1. *That, the learned trial Chairperson erred in law and in fact in failing to analyse and appreciate evidence on record that the appellant probed that he claimed only (7) acres of land out of fourteen (14) trespassed by the respondents.*
2. *That, the learned trial Chairperson grossly erred in law and in fact in finding and holding that the respondent has been in peaceful occupation and possession of the suit land for seventeen (17) years peacefully since 1992 until 2009.*
3. *That, the learned trial Chairperson failed to analyze evidence on record to arrive to proper decision in favour of the appellant who proved his claim on balance of probability.*
4. *That, the learned trial Chairperson grossly erred in law and in fact in relying on Exhibit D1 as documentary evidence and proof for allocation of the land in dispute to the 1st respondent.*

5. *That, the learned trial Chairperson grossly erred in law and in fact in declaring the 1st respondent the owner of the disputed land without a counter-claim to that effect.*

At the hearing of this appeal Mr. Ipanga Kimaay, learned counsel represented the Appellant while Mr. Joshua Jonas Nkya, learned counsel represented the respondent. At the request of parties, the Court ordered hearing to be conducted by way of written submissions.

Supporting his appeal, counsel for the Appellant decided to consolidate the first, third and fourth grounds of appeal and argued them together. The remaining grounds were argued separately.

Submitting on the first, third and fourth grounds of appeal, Mr. Kimaay stated that, the trial Chairman erred in his decision by his failure to consider that the appellant claimed seven (7) acres only which was invaded by the 1st respondent on 2009 and not 14 acres of land (see Page 6 and 12 of the DLHT typed proceedings). He added that, the appellant did not claim the whole 14 acres as he was aware that he was barred by the law of limitation that's why he claimed for seven (7) acres only which was invaded in November, 2009. The evidence of the appellant was supported by PW3 who said he was the one who allocated the said land to the appellant's father though he is not remembering the date and

month of the said allocation (See page 17-18 of the DLHT typed proceedings). It was wrong for the trial chairman to rely on exhibit D1 which did not state the size and boundaries of the land alleged to have been located to the 1st respondent. Thus, he maintained that, the appellant proved his claim of 7acres at the DLHT from the respondent and prayed for these grounds of appeal to be allowed.

Responding to these grounds, respondent's counsel submitted that, the trial chairperson directed his mind to the evidence adduced by the appellant. He explained that, the appellant failed to prove his claims of seven acres alleged to have been trespassed by the respondents herein. There were some contradictions on the evidence adduced by the appellant's witnesses hence the trial tribunal was correct to dismiss his application with costs (See **Mohamed said vs Republic**, 1995 TLR 3).

Further to that, he maintained that, the evidence of the 1st respondent was corroborated by the evidence of the former leader DW3 (Solomon Kisaka Lukumay), who testified that the 1st respondent acquired the said piece of land in 1992 by applying through the village authority.

The learned counsel argued further that, under paragraph 22 of part I of the schedule to the law of Limitation Act, a suit to recover land should be brought within 12 years. In the present case, the first respondent was

allocated the disputed land in 1992 and he was in peaceful enjoyment until 2009 when the appellant filed an action against him which is more than 17 years and therefore outside the prescribed time to file an action to recover land. He cited the case of **Erizeus Rutakubwa vs Jason Angero**, 1983 TLR 365 to support his argument.

He maintained further that, the 1st respondent tendered exhibit D1 to prove that in allocating the said land to him all the procedures required under section 16 of the Village Land Act, Cap 114 R.E 2014 were followed and the village council was involved. Thus, the trial tribunal was correct in his holding that the disputed land belong to the 1st respondent. Hence, these grounds of appeal are devoid of merit and ought to be dismissed with cots.

On the second ground of appeal, Mr. Kimaay argued that, as the appellant made it clear that he only claims 7 acres which was invaded in 2009 and not 7 acres which was invaded in 1998, the finding of the tribunal that the 1st respondent had been in occupation of the said land since 1992 is baseless. Further to that, the 1st respondent failed to describe the said land and its description is unknown. He made reference to the case of **Mwl. Paul Mhozya vs AG** (1992) TLR 229 where this court observed that facts in issue must be established in evidence either

orally or documentary. He argued further that, the 1st respondent admitted that he was given the disputed land for residential purposes and therefore 40 acres cannot be a small portion given to the 1st respondent for residential purposes. He noted that, the 1st respondent admitted that there was a dispute between the parties since 2007 before wazee wa mila and the appellants was warned not to bother the respondent in his land. Thus, he prayed for this ground to be allowed.

In response, Mr. Minja, submitted that, the law of evidence is very clear that whoever alleges must prove (see section 110 (1) of the Law of Evidence Act, Cap 6 R.E 2019). The evidence adduced by the appellant at the trial tribunal was marred with contradictions and failed to prove his claim on the standard required by the law. Since the appellant failed to prove that he was given the disputed land by his late father, the learned counsel prayed for this ground to be disregarded and dismissed with costs.

On the last ground (5th ground), it was submitted by Mr. Kimaay that, the trial chairman erred to declare the 1st respondent as the lawful owner of the suit land while there was no counter claim nor cross application from him. Further to that, no issue was raised in respect of who is the owner of the disputed land between the appellant and the 1st

respondent. He made reference to the case of **Gapco Tanzania Ltd vs Khorsed A. Mula t/a Mula trading Co. Ltd**, Commercial case No. 47 of 2003 where the court held that parties are bound by their own pleadings. Therefore, the DLHT ought to have dismissed the application instead of declaring the 1st respondent as the owner of the disputed piece of land.

Based on the reasons submitted herein, he prayed for the appeal to be allowed and the DLHT's decision to be set aside with costs.

Responding to the last ground, counsel for the respondent contended that, in his written statement of defence, the 1st respondent disputed the appellant's claims of ownership over the suit land and contended that the suit land forms part of his land which he was legally allocated by Emairete Village Council in 1992. Thus, that part of evidence by the 1st respondent countered the claims of the appellant and the same was proved during the hearing at the DLHT. At the end, the DLHT was satisfied that the 1st respondent was the lawful owner of the disputed land. He made reference to the case of **Hemed said vs Mohamed Mbilu**, [1984] TLR 114 where it was decided that, the person whose evidence is heavier than that of the other must win. He maintained that,

the evidence of the 1st respondent was heavier than that of the appellant and prayed for the dismissal of this appeal with costs.

In his brief rejoinder, counsel for the appellant reiterated the arguments in his submissions in chief and argued further that, the principle of adverse possession is not applicable in this case as the applicant claimed for the land which was invaded in 2009 therefore the cited case of **Erizeuz Retakubwa** (supra) is irrelevant in respect of the second ground. Further to that, there was no dispute that the appellant's father was given the said land or not the dispute was between the appellant and the respondent. The appellant also did not dispute that the 1st respondent was given land by the village council of Emairete Village rather invasion of his land by the respondents. His claim is on a piece of land which was given to him by his late father, thus, he maintained his prayer for this appeal to be allowed.

Having considered the rival arguments advanced by the counsel for the parties and examined the record of appeal, this court is now in a position to determine the merit of this appeal on the basis of the grounds of appeal filed in this court.

Starting with the sequence adopted by the parties, that is, the first, third and fourth grounds of appeal. The application filed at the trial court

evidenced that, the appellant claimed only seven (7) acres not the whole 14 acres which was invaded (see the DLHT Application Form). However, in the same application the appellant submitted that, the respondent invaded into the said land since 1998 and started to cultivate it unlawfully. He reported the matter to the police and then to sub- village chairman where no agreement was reached. He decided to remain silent until 2009 when the respondent started to trespass into his land again. On his side, the respondent was of the view that, the appellant's claim was not proved to the standard required by the law. And further to that, as the appellant alleged, he invaded in 1998 he was time barred to file a claim as per paragraph 22 part I of the second schedule of the **Law of Limitation Act** (supra). The provision provides that;

"Suit to recover land..... twelve years"

Based on the cited provision, and counting from 1998 up to 2017 which is more than 19 years the trial tribunal was correct in its finding that the matter was time barred. The same was held in a case of **Stephen Sokoni vs Millioni Sokoni** (1967) HCD No. 46, cited by the learned counsel for the respondent, where it was held that:

"Where a person has occupied a land for such a long period of time without interruption it will be unreasonable and unfair to entertain a claim that intend to defeat his right over such land."

Regarding the issue of Exhibit D1 that it did not state the clear boundaries of the disputed land, I have revisited the said exhibit, and the letter stated clearly that, the village council will put the boundaries "mipaka ya katani" however, during the hearing at the trial tribunal the respondent described the boundaries of his land to be the two paths used for cattle movement, East- there is a main road going to Ngwiki and West- there is Lowasa Ngoliti. There was also a "Kisiki" which was used as a mark/Boundary by the Village Council. Thus, I find no merit on these grounds.

On the second ground of appeal, counsel for the appellant maintained that the appellant was not time barred when he filed his application at the tribunal on 2017 because the claim by the appellant is on a piece of land that was invaded in 2009.

In his testimony at the trial tribunal, the respondent submitted that he was given 40 acres by the village counsel on 31/12/1991. Although in Exhibit D1 the size of land given was not mentioned, the boundaries were specified. The respondent also submitted that he used the disputed land

peacefully until 2007 when the dispute arose between them after the death of the appellant's father. On the appellant's side, apart from claiming that he was given the said land by his late father, there was nothing to prove the said allegation. The documents tendered at the trial tribunal (exhibit P1) shows that, the land measuring 35 acres was given to his late father and there was no evidence that it is the same land which the respondent claimed to be his. Accordingly, this court finds no merit in the second ground of appeal.

On the last ground, the appellant faulted the trial tribunal for declaring the respondent the lawful owner of the disputed land while he never filed counter claim nor cross application as he only prayed for the dismissal of the application. He maintained that, initially no issue was raised at the trial tribunal regarding the ownership of the disputed land thus, the trial tribunal ought to have dismissed the application rather than declaring the respondent as the lawful owner.

Having revisited the trial court proceedings, it is apparent that on 11/11/2010 two issues were framed for determination by the Court which are:

a) Who is a lawful owner of the suit land

b) To what relief (s) are parties entitled.

On the day those issues were framed the respondent was present together with his counsel. Further to that, in his written statement of defence the 1st respondent alleged that the disputed land belong to him after being allocated by the village council of Emairete Village in 19992, therefore, the allegation that the respondent claimed for the application to be dismissed without any prayer that the disputed land belong to him is unfounded and with no merit. That said, and on the basis of the reasons stated, this appeal lacks merit and is hereby dismissed with costs.

It is so ordered.

K.N.ROBERT
JUDGE
10/12/2021