

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DODOMA

LAND APPEAL NO. 09 OF 2018

(Originating from the District Land and Housing Tribunal for Singida at Singida in Land Application 74/2016)

**COSMAS ANTON ITUNGULU (the administrator
of the Estate of the Late MTINANGI ITUNGULU.....APPELLANT**

VERSUS

TIMOTH M. IRUNDERESPONDENT

JUDGMENT

KAGOMBA, J

16/8/2021 & 30/8/2021

COMAS ANTON ITUNGULU suing as an administrator of the estate of the late MTINANGI ITUNGULU, on 01/03/2018 filed an appeal to this Court against TIMOTH M. IRUNDE, the respondent herein, to wrestle the decision of the District Land and Housing Tribunal for Singida District (Hereinafter "Singida DLHT") dated 12/02/2018 in Land Application No. 74 of 2016 which was made in favour of the respondent.

The appeal is a continuation of the legal battle over ownership of land known as Plot No. 144 Block "A" situated at Ikungi District, which started on 19/08/2016 when Timothy Mande Irunde filed Land Application No. 74 of 2016 at Singida DLHT to be declared the lawful owner of the suit land. Mr. Irunde told Singida DLHT that he was allocated the suit land by Singida

District Council in 1984 before establishment of Ikungi District Council, and was issued with a letter of offer which he lost but a loss report dated 27/06/2016 was issued by Police to attest to the fact that he was issued with the said letter of offer. Mr. Irunde further informed the Singida DLHT that he built a house thereon in 1986 but as a civil servant he was transferred to different regions until 2015 when he came back only to find that the appellant's father has trespassed into the suit land.

On the other hand, the appellant who was previously the respondent, told the Singida DLHT that the suit plot was purchased by this father (deceased) from one Saidi Hassan of Mafare village in 1996 and that his father built on the suit land a house with five rooms and verandah in 1997. The appellant was appointed the administrator of his deceased's father estate and that he was granted the suit premises as his personal property. The Singida DLHT shows in its impugned Judgment that the appellant conceded during trial that his father told him that the suit plot was formerly the property of the respondent's father who sold the same to Saidi Hassan in 1992. The appellant called a witness one Hamis Salimu Mwamba who was a Health Officer, and testified as DW2. DW2 told the Singida DLHT that the suit plot was allocated to the respondent's father but he sold the same to Saidi Hassan who later sold the same to the appellant's father. To cut long story short, the Singida DLHT considered the evidence adduced by both parties as well as assessor's opinion and eventually found the application by Timoth M. Irunde full of merit and granted the same. The Singida DLHT thus declared Mr. Irunde the lawful owner of the disputed property and ordered the appellant herein, who was declared a trespasser, to remove his fixtures and leave the plot bare. The Singida DLHT also ordered costs of the

application to follow event That decision of Singida DLHT is what has sparked the current appeal.

The Memorandum of Appeal carried two grounds of appeal and a third one pleaded as an alternative, as follows;

1. The trial Tribunal erred in fact and in law in holding as it did that the respondent managed to prove his case while on balance of probabilities the appellant had firmly established the fact that the suit property belongs to him.
2. The trial Tribunal erred in fact and law in making a finding that the appellant's Sale Agreement has no legal base solely because ownership was not transferred and approved by the Commissioner for Lands or authorized officer.
3. By way of alternative, even if it were to be established that there was no sale of the plot in dispute by the respondent, the trial Tribunal erred in fact and law in not finding as a fact that the respondent had, prior to the institution of the suit, abandoned the suit plot as such it had passed to the appellant by way of adverse possession.

During the hearing of the appeal, the appellant was represented by Mr. Andrew Chima, learned advocate while the respondent was represented by Ms. Amina Hamis, learned advocate.

Submitting on the first ground of appeal, Mr. Chima argued that the Singida DLHT misdirected itself in not judging that the appellant proved, on balance of probabilities, his ownership of the suit land while the respondent

failed. He further argued that the trial Tribunal based its decision on the loss report of the letter of offer submitted by the respondent and failed to consider evidence adduced by the appellant. He argued that one who alleges must prove and in civil suit the proof is on balance of probabilities as per Section 110, and 111 of the Evidence Act, [Cap 6 R. E 2019] but the respondent failed to prove his case before the Singida DLHT.

On the second ground of appeal, Mr. Chima argued that the Singida DLHT erred in disagreeing with evidence adduced by the appellant. He argued that the appellant proved his ownership by producing Sale Agreement for the suit land where the first agreement was between Saidi Hassan and Timothy Irunde and vide the latter agreement the disputed land was sold to Saidi Hassan at Tsh. 15,000/= who in turn sold it to Anthon Itungulu the father of the appellant at a consideration of Tsh. 100,000/=. He also submitted that the appellant told the Singida DLHT that after his father passed away one year after purchasing the suit land whereby he inherited the same and transferred it to his personal names. The learned advocate for the appellant concluded his submission on this second ground by questioning inability of Singida DLHT to call the land officer to prove ownership of the suit land between the two contesting parties.

On the third ground which was pleaded by way of alternative, Mr. Chima argued that the respondent filed his Land Application to Singida DLHT after lapse of twelve years contrary to the law of Limitation Act, [Cap 89 R.E 2019] first schedule, part I item 22 which requires suits to recover land to be filed within twelve years. He argued that the respondent has been silent all the time only to file his suit in 2016 from 1996 when the suit land was

purchased by the appellants father. He cemented his argument by referring to the case of **BERELIA KARANGIRANGI VS ASTERIA NYALWAMBA, Civil Appeal No. 23 of 2015 Court of appeal (Mwanza)** where one of the grounds of appeal was that the appellant filed a land case after twelve years has elapsed and the Court of Appeal dismissed it for being filed out of time. Mr. Chima prayed the Court to allow the appeal, quash the judgment of Singida DLHT and declare the appellant the lawful owner of the land in dispute.

Ms. Amina Hamisi, the learned advocate for the respondent countered each of the three grounds of appeal. On the first ground she found no merit in it because the respondent did prove his case at Singida DLHT that he is the lawful owner of the suit land since he is the one who was allocated the suit land by Singida District Council in 1984. She submitted that the suit land is surveyed and known as plot no. 144 Block "A" Ikungi. She went on to argue that the respondent told the Singida DLHT that the letter of offer that he was given by the authority got lost but after reporting the loss to Police, he was issued with a loss report to that effect. She argued that the loss report was tendered and admitted as an exhibit during trial.

The learned advocate for the respondent further submitted that the respondent also tendered in the trial Tribunal a letter dated 8/7/2016 which recognized him as the lawful owner of the suit land and that up to the date of that letter, the name of the owner of the suit land in the Land Registry was his.

The respondent's advocate further submitted that the respondent told the trial tribunal that he developed the land by building a house thereon but later left the plot to one Njiku after the respondent was transferred to different regions on his employment call. To corroborate the above account of facts, the respondent brought Mr. Jospeh Hema Kibwana to the trial as a witness, who built a house for the Respondent on the suit land, Mr. Kibwana being a marson. The advocate for the Respondent further submitted that even the appellant's father conceded during trial that the land in dispute belonged to the Respondent.

Ms. Amina Hamisi winded up her submission on the first ground by supporting the judgment of the trial Tribunal. She said the judgment didn't base on the loss report alone but considered the evidence adduced by respondent including the letter from the District Council, the authority that allocated the disputed land to the respondent. She thus prayed the Court to disregard the first ground of appeal for being unfounded.

On the second ground of Appeal, Ms. Hamisi again found it unfounded. She argued that there is nowhere in the Court records where the Respondent sold the suit land to Saidi Hassan. She argued that since the suit land is a surveyed plot its disposition would not be possible without complying with the mandatory provisions of Sections 36, 37 and 38 of the Land Act, 1999 [Cap 113 R.E. 2019] which direct that such sale must be approved by the Commissioner for Lands.

Ms. Amina Hamisi argued further that even the Sale Agreement submitted by the Appellant was not approved by the Land Commissioner. She also countered the argument that the Appellant transferred the suit land in his own name after purchasing the same from Saidi Hassan. She argued that even when the appellant was adducing evidence before Singida DLHT, he did not produce evidence of such transfer. She also wrestled the argument that the Singida DLHT did not call Land Officer to prove who was the lawful owner of the suit land. She submitted that it is not the duty of the trial Tribunal to call a witness rather the appellant should have done that if he thought it was necessary to have land officer to adduce evidence during trial. She prayed the Court to disregard this second ground of appeal too.

Ms. Hamisi submitted that the third, alternative ground of appeal also lacked merits for two reasons; **firstly**, what the appellant's advocate submitted orally before this Court differs with what is pleaded in the Memorandum of Appeal regarding time limitation. She submitted that whereas in the Memorandum of Appeal the argument is that the respondent abandoned the suit land hence the same passed to the appellant by way of adverse possession, the appellant's advocate submitted orally that the respondent filed the case after elapse of twelve years. She opposed the oral submission by the appellant's advocate because it differs with what was pleaded in the Memorandum of Appeal.

Secondly, she submitted that the third ground of appeal lacks merit also because the Law of Limitation Act, provides for when limitation of time starts to run. She argued that Section 9(2) of the Law of Limitation Act, provides that time starts to count when the right of action has accrued. She

said that the respondent filed his case in 2016 at Singida DLHT after returning from transfer, only to find that the appellant has trespassed into the land and has built a house. She argued that for the above reason the time started to run the moment the respondent discovered that the appellant has trespassed into the suit land. She argued that counting should start from the date of discovery of trespass hence, the respondent filed his application to Singida DHLT within time spelt by the law. She therefore prayed the Court to find that all the three grounds of appeal lacked merit and proceed to dismiss it with cost.

Rejoining, Mr. Chima argued that the letter from the District Council stated that the Municipal Director's office does not deal with resolving land disputes, hence guided the respondent to file his suit in Court. Mr. Chima also submitted that records do not show that the respondent left the disputed land to the attention of Mr. Njiku when he was transferred. He reiterated his submission in chief on the first ground of appeal by insisting that evidence was submitted by the appellant on the sale of land by Timothy Irunde to Saidi Hassan and later to the appellant's father. He argued that Singida DLHT erred by not considering that evidence.

On the second ground, Mr. Chima rejoined that the appellant called to the trial Tribunal a witness called Hamis Salum Mwamba, a Health Officer, who informed the Tribunal that the land in dispute was first allocated to the respondent's father but was later sold by himself to Saidi Hassan who later sold it to the appellant's father.

Mr. Chima further said that the witness who was called to the trial tribunal also adduced evidence that he witnessed the sale agreement, hence his evidence was supposed to be considered by Singida DLHT. Mr. Chima further submitted that the approval of the sale of land by the Land Commissioner has no merit because the appellant was paying rent for the same land in his own name which is a clear proof of his ownership.

Rejoining on the issues raised by the respondent's advocate regarding the third ground of appeal, Mr. Chima said that the respondent did not show up or even disturb the appellant for more than twenty years until 2016 since 1996 when he sold the land to Saidi Hassan. He reiterated that the respondent filed his application to Singida DLHT out of time and prayed the Court to find merit in the appeal and allow it accordingly.

The above submission by the learned advocates for the appellant and the respondent yield two issues for determination by this Court. The first issue is whether the appellant acquired lawful title to the suit land through purchase agreement. The second issue is whether the respondent's application to the Singida DLHT was time barred.

To address the first issue, I recall the submission of the advocate for the appellant that the appellant proved on balance of probabilities his ownership of the suit land which changed hands from the respondent to Saidi Hassan and eventually to the appellant's father by virtue of sale agreements which were tendered in evidence during trial. According to Mr. Chima for the appellant, his client paid a consideration of Tsh. 100,000/= to Saidi Hassan who had earlier on paid a consideration of Tsh. 15,000/= to

the respondent's father which was evidenced by two sets of sale agreements. Mr. Chima further argued that his client transferred the land in dispute into this personal name and was actually paying land rent in his name which he said it is a clear proof of ownership.

With due respect to the Mr. Chima, acquisition of a lawful title to land which is registered, as is the case with the land in dispute, requires much more than a sale agreement and payment of land rent in one's name. For one to prove ownership of surveyed land, governed by the Land Act, [Cap 113 R.E 2019] he has to show that he complied with procedures for acquiring the land and should show his certification of ownership by either producing a certificate of occupancy or a letter of offer as it were. A sale agreement is an expression of intention of the parties to embark in a land disposition. The intention to sell or buy surveyed land is subject to many terms and conditions such as; the land being available and properly identified; the owner or seller being the rightful owner with a good title to pass to the buyer, consideration being lawful and above all approval of the disposition by the Commissioner for Land being obtained. In this scenario, it was unlikely that the appellant could prove his title to the disputed land before the trial Tribunal without tendering his land title or a letter of offer thereof.

Further, since there was a subsisting letter of offer in the name of the respondent's father, which was not yet revoked, any subsequent ownership through land purchase agreement which is not registered under the Land Registration Act, [Cap 334 R.E 2019] is subordinated. Section 33(1) of the Act provides: -



"33-(1) the owner of any estate shall except in case of fraud, hold the same free from all estates and interests whatsoever," other than: -

- a. Any incumbrance registered or entered in the land register;*
- b. The interest of person in possession of land whose interest is not registrable under the provision of this Act.*
- c. Any rights subsisting under any adverse possession or by reason of any law of prescription.*
- d. Any public rights of way*
- e. Any charge on or over land created by the express provisions of any other law, without reference to registration under this act, to secure any unpaid rates or other moneys.*
- f. Any rights conferred on any person under the provisions of the mining Act, the petroleum Act, the Forests Act or the Water Resource Management Act (other than easements created or saved under the provisions of the last mentioned Act), and*
- g. Any security over crops registered under the provisions of the chattels transfer Act"*

It is the import of this provision that once a person owns an estate his ownership is not subjected to any estate or interest except those listed under paragraph (a) to (g) of subsection (1) to Section 33. This is to say, the letter of offer that was registered in the name of respondent's father could only be challenged by showing existence of one or more of the exceptions mentioned under the quoted provisions of the law.

In this case, the nearest the appellant could prove is his adverse possession under paragraph (c) of subsection (1) to section 33 of the Act. However, such adverse possession ought to have been proved. I shall discuss the issue of adverse passion as pleaded, when determining the second issue to be determined in this case. Suffice to say that on balance of probabilities, a party tendering sale agreement showing that he purchased the land in dispute shall not win the argument over a party adducing evidence of a registered right or interest in the same land, provided that the

registered right was not obtained by fraud and has not been revoked. Time and again people are advised to carry search on land register before purchasing land especially the registered land. It is for this purpose the Land Registration Act, [Cap 334 R.E 2019] enacts under section 97(1) and (2) that;-

"97(1) Any person may inspect the Land Register, any filed documents, the index map or any plan filed in the Land registry during the hours of business" and

"97(2) Any person may require an official search in respect of any parcel and shall be entitled to receive particulars of the subsisting memorials appearing in the Land Register in respect of any parcel, filed document, the index map or any plan field in the Land Registry"

I shall not have discharged my duty properly if I will not analyze a comment on a matter of legal significance with regard to agreements and their admissibility in Courts and Tribunals alike. Section 47(1) of the Stamp Duty Act, [Cap 189 R. E 2018] prohibits admissibility of documents in evidence if revenue stamp has not been duly affixed. The law provides:

" 47-(1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped"

The sale agreement is an instrument chargeable with duty under the act. I have examined the copies of sale agreements which were tendered by the appellant during trial and both have not been duly stamped. This is a contravention of the law. As such the trial tribunal erred in admitting the same in evidence. From this obvious reason my duty is to expunge them from record of the court as I hereby do. Having expunged the said sale

agreement between the appellant's father and Saidi Hassan the total effect is that the appellant did not prove not only his acquisition of a better title in the disputed land over the respondent's lost letter of offer but also failed to prove his purchase of the disputed land from Saidi Hassan. In final analysis, I find no merit in the first ground of appeal and consequently the entire appeal. Under such circumstances even a consideration of the evidence of Hamisi Salim Mwamba becomes inconsequential.

However, since the second issue as framed is of legal significance I propose to comment on it albeit briefly. The appellant submitted that the respondent filed his application out of time set by the Law of limitation Act. He cited the case of **Berelia Karangirangi Vs Asteria Nyalwamba** (supra) to cement his argument. He rejoined that the respondent was allocated land in 1984 and sold the same to Saidi Hassani in 1996 and filed his application in 2016, which was twenty years' period.


For the reason is I have explained above, the sale of land from the respondent to Saidi Hassan has not been proved. The issue then dwells on when the time started to run against the respondent in respect of filing his application to Singida DLHT. As it was correctly submitted by Ms. Amina Hamisi, advocate for the respondent, time started to run upon the respondent finding that someone has trespassed into his land, which was after returning from his transfer, and not from the date he was allocated land. For this reason, even the second issue would have been determined by this Court against the appellant.



In the upshot, the appeal lacks merits and I hereby dismiss it with costs.

ordered accordingly.




ABDI S. KAGOMBA
JUDGE
30/08/2021