IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 65 OF 2021

(Arising from Land Appeal No. 198 of 2021 in the District Land and Housing Tribunal Mara at Musoma and original in Musoma District)

DORA ANDREW ..... APPELLANT

VERSUS

ROBERT MUGINI ..... RESPONDENT

JUDGMENT

7th & 31st March 2022

F.H. MAHIMBALI, J.:

The appellant successfully sued the respondent at the trial Ward Tribunal for a claim of disputed land. Aggrieved by that decision the respondent successfully challenged the said decision before the DLHT of Mara – Musoma. The appellant has now come before this Court challenging the decision of the DLHT at its capacity as first appellate court/tribunal.

The facts of the case establish that the appellant claims possession of the said land in dispute as owned by her deceased husband and that the respondent was using the suit land for temporary use only as given by the appellant's husband. The appellant claims that just after the demise of her

husband, the respondent having stayed there for a considerable long time, applied for allocation of the same land from the village land authority and was granted its occupation against the appellant. On the other hand, the respondent admits that the said suit land first belonged to one Bunini Burongo. He begged him for use and he was given it. Then, the said Bunini Burongo shifted from that place leaving him there. After, he had used it for a considerable time (from 1991 until 2003), he then thought of owning it from the village authority where he was officially allocated the said land.

This then prompted the appellant to file a suit against the respondent at the trial Ward Tribunal where she successfully sued him on the claim of that land.

Following the reversal decision of the DLHT, the appellant has preferred the following three grounds of appeal, namely: -

1. *That, the first appellate tribunal erred in Law and facts for disregarding the evidence of the Appellant and her witnesses whose evidence is heavier than that of the respondent and his witnesses.*
2. *That, the 1st appellate tribunal erred in law and fact for failure to determine that the land in dispute is occupied by the appellant under co-occupancy and the respondent was tenant over the land in dispute.*
3. *That, the 1st appellate tribunal erred in law and fact for failing to determine that the respondent did not proof the*

criteria on acquiring title to land in dispute by adverse possession through village government authority.

During the hearing of the appeal, the appellant was represented by Mr. Gervas Emmanuel whereas the respondent was represented by Mr. Ostack Mligo, both learned advocates.

While arguing the three grounds of appeal jointly as they are interdependent to each other, Mr. Gervas Emmanuel submitted that as per evidence in record, the first appellate tribunal (DLHT) erred in law and facts in determining this matter without according necessary weight the evidence by the appellant who the is rightful owner of the dispute land. It was his argument that the typed judgment of the DLHT at page 6 (1st and 2nd paragraphs), the only reasons given by the DLHT in giving that verdict is merely because of long occupation of the said land for more than 20 years. However, he argued that as the evidence is tight that the respondent was just temporarily given land by the husband of the appellant, he wondered why the chairperson of DLHT is at dilemma as to how the said land transferred from the father in law of the appellant to the husband of the appellant. With that doubt, it was then the basis why the DLHT gave verdict for the respondent. He then queried if that was proper.

He submitted further that according to PW1 (page 2 of the hand written) establishes the respondent being given the said land by the appellant's husband. This is supported by the evidence of PW2 and SU1. Considering the evidence in record, the respondent is not adverse possessor but just an invitee. How could he then turn to be the owner in the face of an invitee.

With this evidence, he invited this Court to have a look the case of **Hemed said vs Mohamed Mbilu** (1984) TLR 113 that only a party with heavier evidence is the one that must win. So, the important question is whether it was proper for an invitee to seek possession of the said land from village authority while he was just invited to use the said land by Mr. Bunini Burengo. In the case of **Kasim Nguba vs Adija A Kaviga** (an administration of the estate of the late Beuto Joseph Kigite, Land appeal No 10 of 2019 (HC – Mbeya), had the best findings. In the instant case, the respondent had no justification to seek the possession of the said land he was given by Mzee Bunini Burengo. He had no colour of right of the said possession.

He wondered further whether the said village land council/assembly allocated the said land to the respondent procedurally. He submitted that in the absence of full, fair and prompt compensation

to the appellant, that disposition of land to the respondent by the village authority was not proper as per law.

He concluded that as per DHLT's judgment at page 6, the chairperson misapprehended the facts and evidence of the case. As Andrew died and that the land was jointly owned, upon the demise of the said Andrew Bunini the land automatically was transferred to the appellant (wife). As per evidence in record it is undoubted that the appellant is the owner of the said land. He thus prayed that the appeal be allowed with costs borne by the respondent.

In opposing the appeal, Mr. Mligo submitted that as per what transpired at the trial ward Tribunal, none of the appellant's witnesses established that she owns that land. There is no evidence in the trial tribunal record how the said husband of the appellant acquired the said land.

He exemplified that at page 7 of the typed proceedings, SM2 was 33 years old when he was testifying. As he had testified for matters of 1991, suggested that he was just 4 years old by then. When being cross examined at the trial Ward Tribunal, the witness was not at easy to respond to the questions.

As who between the two had weightier evidence, Mr. Mligo was of the firm view that there was more evidence that the said land was given to him by Bunini Burengo who was the owner of the said land (see page 13). The said Bunini Burengo in 1991 transferred to another place, leaving the respondent there. By all that time, the respondent has never been disturbed by either the appellant or the said Andrew Bunini as alleged. In the circumstances of this case, the respondent after asking for the said land, she was given (see proceedings at page 17), where the said evidence is clear.

On the weight of evidence, he submitted that the case of Hemed Said is more suitable to the respondent's case than the appellant's case.

In his considered view, the DLHT was right in deciding so. As the Ward Tribunal misapprehended the facts and evidence, the DLHT rightly evaluated the case see the case of **Deemay Daart and others vs Republic (2005)** TLR 132 where it was held. "It is a common knowledge a superior court where the interests of justice require, can intervene the question of evidence at the trial court".

He concluded his submission saying that as per section 45 (1) a of the village Land Act, Cap 114, it is his candid view that the appeal is not meritorious and the same be dismissed with costs.

In his rejoinder submission, Mr. Gervas insisted that the appellant being the wife to the deceased's husband, she automatically inherited it. That SM2 was four years by 1991, his credence is only questioned at trial. He was not cross – examined on that. Raising it now is an afterthought. He added further that the testimonies of SU2 and SU3 are more doubtful. On that basis, he prayed that as the grounds of appeal are meritorious, the appeal be allowed with costs as the appellant's evidence is heavier than that of the respondent.

Having heard the submissions from both parties, the ball is now for the Court to determine the appeal whether it is meritorious.

In consideration of the jointly argued grounds of appeal, the central question in disposing of this appeal is whether in consideration of the evidence in record, who between the two is the rightful owner of the disputed land.

The law is, a fact is said to be proved in civil matters if its existence is established by a preponderance of probability (See section 3(2)b of the Tanzania Evidence Act, Cap 6 R.E 2019). This is in alliance with spirit of sections 110-112 of the Evidence Act, that a party who wishes to obtain judgment of the court, is duty bound to establish the existence of those facts. In the case of **Hemed said vs Mohamed**

Mbilu (1984) TLR 113, it was held that there can hardly be equal evidence to both parties in civil case but only a party with heavier evidence is the one that must win.

In the current case, the appellant claims that the disputed plot belongs to her and that the respondent was welcomed there by her husband. This evidence appears to be supported by the evidence of SM2 who happens to be the relative of SM1 (the appellant). On the other hand, the respondent in his evidence admits that the said land originally was owned by Bunini Burongo who is the father – in – law of the appellant (suggesting that is the father of the appellant's husband). He sought refuge from him in 1991 and stayed there until 2003. It was in 2003 when the respondent then initiated the occupation of the said land from the purported village authority where he was granted the same.

I have critically analysed the evidence in record, I am of the view that the appellant lacks evidence to claim right of the said land. I say so on the basis that she has not been able to establish that the said land belongs to her. There is no evidence either to support the allegation that it was jointly owned between her and her deceased husband or that it was owned by her and that only her deceased husband welcomed the respondent for use only.

On the other hand, it is clear that the respondent was licensed use of the said land by Mr. Bunini Burongo who is the father – in – law of the appellant. If this assertion is correct, then the respondent as well was not justified to process possession of the said land as he was just an invitee of the said land. The law is clear that an invitee to land, however long stay one makes or developments made, he only remains an invitee to that land and not otherwise.

The Court of Appeal at several times has made a reminder that where a party to a land in dispute was an invitee the, law is clear that no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made to the land on which he was invited - see: **Mussa Hassan V. Barnabas Yohanna Shedafa** (legal Representative of the late Yohanna Shedafa), Civil Appeal No. 108 of 2018, CAT at Tanga- unreported, **Samson Mwambene v. Edson James Mwanyingili** [2001] TLR 1**, Makofia Merianangа v. Asha Ndisia** [1969] HCD n. 204 and **Swalehe v. Salim** [1972] HCD n. 142; recited in **John Livingstone Mwakipesile v. Daudi William** & 6 Others, Miscellaneous Land Appeal No.5 of 2012 (unreported). In **Maigu E. M.**

Magenda v. Arbogast Mango Magenda, Civil Appeal No. 218 of 2017 (unreported) observed at p. 13 thereof:

> *"We do not think continuous use of land as an invitee or by building a permanent house on another person's land or even paying land rent to the City Council of Mwanza in his own name would amount to assumption of ownership of the disputed plot of land by the appellant".*

In the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 others**, Civil Appeal No. 193 of 2016 at page 24 , the Court of Appeal on a claim of adverse possession by a party claiming land ownership observed 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 while making reference to 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 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.

As per available evidence, neither can respondent claim ownership of the said land as submitted, because the evidence in record does not support him. His attempt of seeking ownership of the said land from the

purported village authority is legally unlawful and unjustified. First, the said authority is said to be Social Welfare Committee of Bugoji and not the Village Land Council as legally mandated to do so. The said document exhibiting grant of the said land to the respondent is hand written as follows:

YAH: HATI YA KUMILIKI KIWANJA CHA MAKAZI

Kamati ya Ustawi/ Jamii Bugoji imemkabidhi Kiwanja cha Makazi Ndg Robert Mgini ili akimiliki kwa makazi na familia yake. Kiwanja hiki kiko eneo la Kitongoji cha Kanderema. Kiwanja hiki kilikua kinamilikiwa na Mzee Bunini Buringo baada ya kuwa ameshahama ndani ya kiwanja hiki, ndugu Robert Mgini akatuma ombi la kuomba kiwanja hicho kwenye Kamati ya Ustawi /Jamii Bugoji na ombi lake likakubaliwa na kupewa kiwanja hicho tarehe 05/08/2003. Mipaka ya Kiwanja hiki ni kama ifuatavyo: Mashariki, kiwanja hiki kinapakana na viwanja tupu ambavyo havijapewa wamiliki. Magharibi, kuna ndugu Andrew Bunini, Kaskazini kuna shamba la ndugu Mauma na kusini kuna barabara iendayo Waliku.

Uthibitisho wa ugawaji wa kiwanja hiki umefanywa na Wanakamati ya Ustawi/Jamii wafuatao:

1. *Robert K. Maiga – M/Kiti Kamati*
2. *Rukondo Elisha – Katibu*
3. *John Mganga – Mjumbe*

4. Hilda Manyama - Mjumbe

According to the Village Land Act, the vested authority in the management of village land is the Village Land Council and not Social Welfare Committee as appears in the current matter. This is as provided under sections 22-24 of the Village Land Act. That said, the purported grant of land to the respondent by the said Social Welfare Committee of Bugoji is not the vested authority as per law to allocate or grant ownership of the said land as done.

Secondly, as the said land is established to have been occupied/owned by Mzee Bunini Burengo, it could only be granted to someone else by the appropriate land authority (Village Land Council) upon there being full, fair and prompt compensation to the original owner (See – **The Village Chairman KCU – Mateka vs Antony Hyera** (1988) TLR 188- where it was held that there cannot be land allocation to another person without prior consultation to the former owner. Also, in the case of **Agro Industries Ltd vs A.G** (1994) TLR 43, it was held that any revocation must take into account the interest of the original owner. As the right of ownership of the said land had not been revoked from the original owner, the purported authority was not legally justified to re- allocate the same land to the subsequent owner

(respondent) on two accounts: Not relevant authority and secondly that it had not consulted the original owner and not the respondent who is the invitee.

Having revisited the case's evidence and the submission of the parties' counsel, I am of the view that neither the appellant has the colour of rights of the said land in the absence of proof of ownership of the same nor the respondent. The declaration that the respondent was legally justified to possess the said land on the basis of adverse possession is unjustified in the circumstances of this case where there is ample evidence that he was just invited to use the same by the said Mzee Bunini Burengo. I am thus of the firm view that unless the ownership of the said land is revoked from the possession of Mzee Bunini Burengo, the respondent cannot acquire title of it. He will merely remain an invitee of the said land until when the revocation of the said land is legally done against Mzee Bunini Burengo.

That said, the decisions of the two lower tribunals are hereby quashed and set aside. The parties' status in respect of the ownership of the said land goes back to zero square as none has established ownership of the said disputed land. The respondent will only remain an invitee of Mzee Bunini Burengo over that disputed land until when the

contrary is established or otherwise, whereas the appellant lacks locus even if related to Mzee Bunini Burengo.

The party with locus, can claim possession of the said land against the respondent.

It is so ordered.

DATED at MUSOMA this 31st day of March, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 31st day of March, 2022 in the present of both parties and Mr. Gidion Mugoa, RMA

Right of appeal is explained

F. H. Mahimbali

JUDGE

31/03/2022