

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
LAND DIVISION
LAND APPEAL NO. 18 OF 2020

(Originating from the Decision of District Land and Housing Tribunal of Rukwa at Sumbawanga in Land Application No. 60 of 2014)

MUKWA YEYE..... APPELLANT

VERSUS

SAID MAKENGLE.....RESPONDENT

**(Administrator of the Estate of
the late Lufwega Makengle)
The Deceased**

JUDGMENT

Date of Last Order: 25th April, 2022

Date of Judgment: 22nd July, 2022

NDUNGURU, J

The appellant was aggrieved by the decision of the District Land and Housing Tribunal of Rukwa at Sumbawanga (DLHT), after filing an application that the respondent herein has forcefully and unlawfully entered upon the disputed land and remained therein without the applicant's permission despite all necessary efforts made in trying to vacate him, whereas the appellant had claimed for eviction order of the

respondent and all his relatives/agents, general damages for trespass (mesne profits), permanent injunction and costs of the suit.

After full trial, the trial tribunal declared the respondent the rightful owner of the suitland meaning he has not trespassed the same, a decision which grieved the appellant entirely thus appealing to this court in search for his solace, whereas in doing so in his amended memorandum of appeal he had four grounds of appeal which are as hereunder;

1. The trial Chairperson failed to evaluate properly the evidence given during trial by not finding that the given evidence wholly favored the appellant.
2. That the trial chairperson erred in law and fact to fault the PW2 (Alkado Rahisi) conduct of suing the respondent at the Village Assembly and giving benefit of the doubt to the respondent, without considering the reasons thereof that;
 - i. The respondent's father who borrowed the land from the witness had already returned it to the latter and completely vacated the same and established his new residence away from there.
 - ii. That there was a finding by the witness that the respondent was intending to sell away part of that land

in breach of the borrowing conditions given to his father.

3. That the trial tribunal chairperson erred in law and fact to declare the respondent owner of the suit land due to his long occupation and use thereof for about 33 years without considering the fact the said respondent entered into the land through his father who was an invitee of the witness PW2 who then claimed back the land and recovered the same from the respondent's father leaving the respondent as a trespasser as his father vacated.
4. That the judgement and decree against which this appeal is made was given by the Sumbawanga District Land and Housing Tribunal on the 27th March, 2020 so it is within the Court's jurisdiction.

The appellant thereafter, prays for this court to quash the trial tribunal's judgement and set aside the decree, with costs.

As the matter was scheduled for hearing, the appellant enjoyed the service of Mr. B. S. Chambi learned Advocate while the respondent was under the legal services of Mr. Masubi Kitanda Mbogo Learned Advocate.

As he was invited to argue for the appellant's grounds of appeal, he however submitted on three, leaving out the fourth ground, Mr. Chambi broke the ice by arguing for the 1st ground that, the appellant

was praying for eviction/vacating order from the land he had purchased while the respondent resisted to vacate on the reason that he inherited it from his father. The learned advocate added, in proving his claim the appellant had five witnesses. The first was the seller of the suit land one Samwel Makengele, the second was Alkado Rahisi who sold the land to the former, the hamlet leader of the suit land who also witnessed the respondent's father vacate the suit land, the Ward Tribunal chairman and the last was the witness who was invited stay on the suit land by Samwel Makengele. Mr. Chambi submitted that, all the witnesses' testimonies proved the ownership of the suit land by the appellant.

The learned advocate for the appellant submitted further, that the appellant went to the suitland in 1970's while young boy as he was with his father. That the father of the respondent requested to use the land from one Alkado who gave him on the condition that he should not transfer it. As in 2010 the father of the respondent wanted to sell it, Alkado took it from respondent's father. To that consequence, the respondent's father and his elder son one Samwel shifted to establish new residence elsewhere. In 2010 while his father left the respondent remained there at the suitland, and Alkado filed a suit against the respondent before the village Land council. Whereby the village land council ordered the respondent to vacate the suitland.

The learned Counsel for the appellant added that, the respondent being dissatisfied filed a suit before the Ward Tribunal against Alkado challenging the decision of vacating the suitland, but when the matter was called for hearing the respondent never appeared to the Tribunal to prosecute his case, till on 09/08/2010 when the tribunal gave the right of ownership to PW2 one Alkado.

Thereafter, he added, PW2 one Alkado decided to dispose the said land and on 22/08/2012, the respondent's brother one Samwel Makengele purchased the said land for a consideration of 22 cows. The sale Agreement was tendered before the trial tribunal as "Exhibit P2".

As far as the 1st ground is concerned, the learned counsel rounded up on that ground by submitting that, on 25/03/2014 Samwel Makengele entered into sale agreement with the appellant. The sale was done and 15 people witnessed the sale, including village chairman. After the sale when required to vacate, respondent denied to vacate saying he had inherited the land from his father. The appellant purchased the suitland after being satisfied with the title of the seller.

As he attempted to prove his ownership at the trial tribunal, the respondent summoned five witnesses, as he claimed to have inherited from his father, but he never said how his father acquired the suitland. Meanwhile, the evidence of his brother one Samwel Makengele,

supported the evidence of Alkado Rahisi that his father had borrowed the suitland from Alkado. Neither the respondent nor his four witnesses did explain how he or his father acquired the suitland. All witnesses testified to have met the respondent with his father living on the suitland.

It is therefore that the respondent never denied the fact that his father was welcomed there temporarily. To that fact the learned counsel insisted that the trial tribunal would have declared the appellant as the rightful owner.

Submitting on the 2nd ground, Mr. Chambi said, the appellant never sent the father of the respondent to the tribunal because he had already handed the suitland to the owner as he tried to sell it without the consent of the owner. Thus, the tribunal misdirected itself on this aspect.

Coming to the 3rd ground, Mr. Chambi submitted that, the trial Tribunal tried to apply the doctrine of adverse possession, whereas such a doctrine cannot apply as the respondent lived there on the basis of his father who was an invitee. He added, an invitee cannot claim right. He referred this court to the case of **Ramadhan Makwega V. Teresia Mauzo High Court Land Appeal No. 3 of 2018** (Unreported). Page 3 of the judgment the court said

*"in the instant case, the records shows that _____
_____ the invitee cannot claim it on adverse possession"*

In clarification, Mr. Chambi said, the respondent being the son of an invitee, cannot claim possession under adverse possession. He again referred this court to the case of **Angelo Kapufi V. Edward Matonda and 2 others Land Appeal No. 30 of 2019** (HC) Unreported.

Mr. Chambi rested his case by submitting that the cited cases are in par material with the case at hand, and therefore he prays for this court to find and rule as this court ruled/decided in the cases cited, and that the appeal be allowed.

In response to the submission made by Mr. Chambi, the learned Advocate for the respondent, Mr. Mbogo submitted that he resists the appeal. And that he will respond to the grounds of appeal as submitted by the counsel for the appellant.

The learned Counsel for the respondent took off by arguing that, this is an appeal. Being an appeal, what the court will base on is what is on record. The guiding documents are proceedings of District Land and Housing Tribunal in Application No. 60 of 2014. He argued further that, what is in the record, the court will take it to be genuine and correct, because the court record is a serious document which cannot easily be

impeached, and he cited the case of **Khalfan Sudi V. Abieza Chichci (1998) TLR 527** as an emphasis.

Submitting against the 1st ground, the learned counsel argued that it is not true that the chairman failed to evaluate evidence. He added that the evidence was properly evaluated and that the evidence gave victory to the respondent. He cited Section 101 of TEA which gives basis for proof of fact/case. Mr. Mbogo insisted that the standard of proof is on the balance of probability and that the burden of proof does not shift. In insisting his point, he referred this court to the case of **Samson Ndawavyo V. Reresia Thomas Madaha Civil Appeal No. 45 of 2017**, where it has been referred with approval in the case of **Manase Mayela V. Biashara Saccos Ltd & Another Land Appeal No. 27 of 2020** HC at Shinyanga (Unreported)

The learned Counsel added that Section 119 of TEA is very clear. In illustration he again referred this court to the case of **Mohamed Abdul Lyuu V. Zainabu Kasimu Lyuu Misc. Land Appeal No. 56 Of 2019** (HC) Unreported, where the cited provision was trussed.

He added that, in the basis of the above cited case, the appellant cannot rely on the weakness of the evidence of the respondent to prove his ownership. Page 3 of the proceedings of the trial tribunal the

appellant said, the said farm was sold for consideration of 100 Cattles and he produced the sale agreement which was marked as Exhibit P1.

However, the learned counsel argued that the appellant is MUKWA YEYE but Exhibit P1 that is the agreement is between Samwel Makengere and Njokara Yeye., and thus the sale agreement and submission that the appellant bought the suitland from Samwel Makengere is not true, as the parties in the agreement are not the same. The learned counsel therefore humbly submits that Exhibit P1 be impeached, and that the court not to accord it with any weight.

Mr. Mbogo maintained further that, the evidence available in the proceedings, nowhere the appellant nor his witness has testified on such discrepancy or relationship with the purchaser in the agreement for sale. It was submitted by the learned counsel that Samwel Makengele had bought the suitland from one Alkado (PW2) before selling the same to the appellant. Mr. Mbogo stressed that at page 4, the appellant tendered the said sale agreement as Exhibit P2. However, he contended that the said exhibit is of no help because, it does not point the size of the land but only consideration which is 20 cattle. That, Exhibit "P1" and "P2" are very contradictory Exhibit P2 is not the sale agreement between Alkado and Samwel, but it was the execution of Ward tribunal decision. Which were executed against the Order of law. Exhibit P2 in substance is that it

was not the sale agreement. Yet the execution of the said order of the tribunal were ex-parte. Nevertheless, the case was tried de novo and the respondent won the case, he prays for this court to go through exhibit D1.

Mr. Mbogo winds up on the 1st ground by maintaining that, for the court to find the ownership, the appellant had to prove three things which he didn't. One, he had to prove that Alkado Rahisi was the lawful owner of the Suitland land before selling to Makengele, secondly, Samwel Makengele was the lawful owner before selling to the appellant and thirdly, the respondent is a trespasser. No evidence was tendered to prove the three elements above on the following.

He added that, at Page 10 of the proceedings when PW2 Alkado testified said he borrowed Samwel the land in 1974 and on page 9 he said, Samwel's father asked him the land from. At page 10 PW2 said to have sold more than 10 acres. At page 11 PW3 said he bought by consideration of 25 cattles while Exhibit "P2" talks of 20 cattles. Mr. Mbogo exclaimed that in totality the evidence is contradictory. The contradictions are material inconsistencies which discredit the appellant's evidence, he referred this court to the case of **Luta Simphorian Nelson V. Attorney General & Another (2000) TLR 419**, and he insisted that consideration is an important aspect which cannot be

forgotten, to that effect therefore he contended that the evidence is not worth of credit, and submits that this ground be dismissed for being devoid of merit.

Arguing against the 2nd ground Mr. Mbogo said, the trial tribunal was right because when the dispute arose the father of the respondent was alive, and according to Alkado, he rented the farm to the father of the respondent in 1974. The learned counsel added that, according to DW1 who is the respondent, at page 21 he said my father was given the land in 1977 it was bare land he occupied, that there was no owner as it was a bare land and that, by then when sued his father was alive.

Learned counsel argued furtherly that, if PW2 borrowed the land to the father of the respondent he could have sued him (the father) and not the respondent as he was alive. And therefore, Mr. Mbogo agrees with the trial chairlady that she was right to doubt and use such a doubt to the benefit of the respondent.

As to the 2nd ground, Mr. Mbogo conclusively argued that on the 2nd limb of this ground, the evidence on record does not show if the respondent wanted to dispose of the suitland. And that, there was no proof on the evidence on record that the father of the respondent borrowed the suitland from Alkado Rahisi. Thus, he believes this ground is devoid of merit.

On the 3rd ground of appeal, the learned counsel said the ground is contradictory. That, there is no evidence available that the respondent and his father were borrowers of the suitland. He added, as seen at page 21, DW1 said there was no owner on the suitland as it was a bare land. And that, they started living there in 1977 while he was 15 years. As there is no evidence that he borrowed and as he has been there for 33 years on borrowing basis all such long time, Mr. Mbogo submits that the respondent has been occupying the suitland legally.

Mr. Mbogo furtherly submitted that, as seen at page 7 the respondent was there when the suitland was sold, and that it was Samwel Makengele who sold the suitland, and that he concludes by saying, that the appellant bought the suitland without taking caution of the ownership, because he bought it while the respondent was occupying it. The seller had no title to sell it. In support of his argument, Mr. Mbogo cited the case of **Khadija Seleman Mohamed V. Emmanuel Henry Mrema Misc. Land Appeal No. 136 of 2017 HC – Dar es salaam** (unreported), and stressed that the appellant cannot benefit from his failure to take caution. He added by referring this court to the case of **Abdallah Irunde V. Msunga Ntunda & Another Misc. Land Appeal No. 38 of 2019 HC Dodoma** (Unreported), and prayed for this appeal be dismissed with costs.

In rejoinder, Mr. Chambi submitted that, he reiterates his submission in chief. That, the burden of proof was to the appellant and he had proved the case by calling five witnesses and himself testifying. Mr. Chambi added that, regarding discrepancies, the law is very clear. He referred this court to the case of **Lutta V. AG (Supra)**, the discrepancies depend on the case not all delegate the case.

The learned counsel submitted further that, Mukwa Yeye and Jokala Yeye is the same person as parties and witnesses were there. He maintained that, even during trial such an issue did not arise as the witnesses who witnessed the sale testified, even in the judgment of the tribunal he added, never pointed the discrepancies.

Mr. Chambi proceeded by yielding that the court record is not limited only to proceedings they include judgment, decree and other document attached in the proceedings. That, the record is clear, the respondent said his father was given the land by Alkado, on the condition not to sell it. Contrary to the testimony of DW1, that if he was given the suitland, who gave it him and if it was a bare land how could he be given it. Mr. Chambi believes that, the respondent was very young he did not know the conditions, and that is why when Alkado wanted the suitland back the respondent's father and brother vacated the suitland.

The learned counsel proceeds by contending that, Alkado was given right against the respondent in 2010 while, it was in 2014 when the respondent filed the case against the appellant. Therefore, for the tribunal to entertain the same case afresh it was improper for there was a judgement. He added, what the counsel for the respondent has submitted was an execution is not true, Mr. Chambi insists that, it was a sale agreement and that is why it was witnessed.

Mr. Chambi added further that, after the respondent's father had returned the suitland to the owner, and the respondent remained there without his permission, then he became a trespasser. The learned counsel clarified that, what made Alkado vacate the respondent's father was because the respondent wanted to sell the suitland.

Mr. Chambi then concluded by submitting that, as regarding the differences in consideration that depended on time. That, the basis of the judgment was a long stay of respondent on the suitland and nothing else. He clarified that, adverse possession looks on how the respondent entered the land whereby, the respondent's father vacated the suitland in 2010 and the respondent was required to vacate on the same year. Therefore, he insists that, adverse possession cannot apply.

I have dispassionately gone through the exhaustive submissions of both sides and trial tribunal's records, the vital issue for determination

here is whether the appeal is meritorious. As I determine this appeal, all the grounds of appeal will be covered diligently.

Firstly, I find it crucial to remind both camps herein that, this Court being the first appellate court has powers to evaluate and consider the evidence and make its own decision. See the case of **Prince Charles Junior v. Republic, Criminal Appeal No. 250 of 2014**, CAT at Mbeya, (unreported).

This position was also reiterated in the case of **Siza Ptrice V. Republic Criminal Appeal No. 19/2010** (CAT - unreported) where the Court stated as follows:

"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 off act, if necessary".

The evidence on record is vivid that the appellant bought the suit land from a person (PW3-Samwel Makengele) who is a step brother to the respondent. See page 21 of the trial tribunal's proceedings. Nevertheless, both PW3 and the respondent agree in their own words that their father, was invited by another person on the suit land. See pages 11 (paragraph 3) and 21 (on cross examination) respectively.

The evidence of the appellant himself is descriptive and worth of credit in determining ownership of the suitland. This is because, as per his testimony as found on page 3 of the trial tribunal's proceedings that he bought the suitland from Samwel Makengele which is measured approximately about 500 acres, for the consideration of 100 cows in the presence of the village chairman and other witnesses.

However, the testimony of the respondent herein lacks cogent descriptions as to the fact of ownership of the suitland. In his testimony at the trial tribunal. The respondent testified that, he began living at Mkole in 1977 being under the core of **his mother and brother**. In Cross examination, he said he was 15 years of age when they started living at the suitland as they shifted from Shinyanga to Mkole. He was with his father, and that it was his father who was given the suit land. Never at any point of his testimony, did he mention he was under which brother's core, and who had given his father the land. But, considering the chain of events as they are, one could easily point out the brother referred to here could be Samwel Makengele (PW3), and as the respondent was only 15 years by then, the one who gave his father the land could be Alkado Rahisi (PW2), who seems to be the only person with interest on the suit land as he had several encounters with respondent at the Ward Tribunal for trespass. However, I need not to go

there because this battle is no longer between Alkado Rahisi and the respondent.

As per available evidence on record, it is clear that the one who is conversant with the said land is PW3, he knew that his father was invited by Alkado Rahisi on the suitland and among the conditions given to him was not to sell the suitland. In his testimony, PW3 said the respondent attempted to sell the suitland and that is when Alkado Rahisi reclaimed his land, and sued the respondent for trespass. He and the respondent's mother vacated the suitland leaving the respondent behind. He added that, PW2 won the suit and thereafter announced to sell the suitland and that is how PW3 got it for the consideration of 22 cows and he too sold it to the appellant for the consideration of 100 cows.

However, the respondent in his testimony did testify that before his father passed on, he did distribute his land properties to his children, and that he was given the suit land by his father on the year of his death, that is 2011, there was no witness or document which corroborated this testimony.

Nevertheless, the respondent also tendered the summary of their clan meeting, which chose one Usumau Saidi as the Administrator of the estate of their late father. Neither did this meeting nor did the

Administrator mention the suitland, as if it was clearly known to all the suit land did not belong to the deceased.

The respondent had also testified that he had lived on the suitland for over 33 years with his family, but he never clarified which family was he referring to, as it appears on records on page 19 of the proceedings that he began living at the suit land under the care of his mother and brother. And that, he was sued by Alkado Rahisi in 2010 whilst his father was still alive, who died in 2011. This chain of uncertainties has made me conclude that the respondent has not revealed which boat has him sail on this ocean of owning the suit land.

Here is my clarification. At no point did either side reject that the respondent's father was invited on the suitland, bare as it was, 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. The fact was well stipulated in several High Court of Tanzania cases such as **Samson Mwambene v. Edson James Mwanyingili [2001] TLR 1**, **Makofia Meriananga v. Asha Ndisia [1969] HCD n. 204** and **Swalehe v. Salim [1972] HCD n. 142**, to mention a few.

I find no harm in insisting the principle by citing the decision of the Court of Appeal of Tanzania, in **Maigu E. M. Magenda v.**

Arbogast Mango Magenda, Civil Appeal No. 218 of 2017

(unreported) which held that, among other things 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".

It is therefore black and white that, an invitee cannot own a land to which he was invited to the exclusion of his host whatever the length of his stay. It does not matter that the said invitee had even made unexhausted improvements on the land on which he was invited. Relating the fact above with the case in hand, the respondent's father was an invitee and that, the respondent can not claim for ownership over the land which his father was invited.

Let me not confuse anyone. I am active to the principle of adverse possession that a person who does not have a legal title to land may become owner of that land based on continuous possession or occupation of the said land. However, without murmuring, the principle cannot apply in circumstances where the possession roots from the owner's permission or agreement. At this juncture, I am reminded of the famous case of **Registered Trustees of Holy Spirit Sisters**

Tanzania v. January Kamili Shayo & 136 others, Civil Appeal No. 193 of 2016 (unreported), which quoted with approval the case of **Mbira v. Gachuhi [2002] 1 EA 137** (HCK) wherein it was held that:

"The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises; if the occupiers right to occupation was derived from the owner in the form of permission or agreement, it was not adverse".

That being the position, alluding to the present case, the respondent's occupation of the disputed land cannot be said to be amounting to adverse possession as in his own testimony, he said he was given the suitland to inherit in 2011, and in his testimony in chief he said he has lived on the suit land for over 33 years, whereas earlier he conceded to be under the core of his mother and brother. Again, he told the trial court that his father died in 2011, therefore the doctrine is unapplicable.

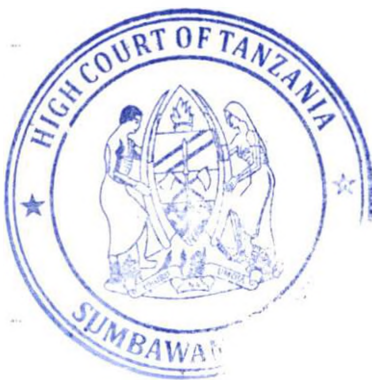
It being the first appellate court, in my clear digest re-appraised, re-assessed and re-analyzed the evidence on the trial tribunal's record and arrived at a correct position of the law, the trial tribunal erred in declaring the respondent as the rightful owner of the suitland. So long as his father remained an invitee to that suit land, there was no time

that status changed to being owner of it, and the inapplicability of the Principle of Adverse Possession. I find this appeal with merits.

I therefore, proceed to allow this appeal, the judgement of the trial tribunal is hereby quashed, and the decree thereto is set aside. The appellant is declared the rightful owner of the suitland.

I make no orders as to cost.

It is Ordered Accordingly.




D. B. NDUNGURU

JUDGE

22/07/2022

Date - 22/07/2022

Coram - Hon. K.M. Saguda – Ag, DR

Appellant - Present

Respondent - Present

B/C - J.J. Kabata

The matter is coming for judgment, and this judgment is ready to read to parties.




SGD: K.M SAGUDA

Ag, DEPUTY REGISTRAR

22/07/2022