IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

LAND APPEAL NO. 18 OF 2020

(Originating from Land Application No.3 of 2019 at Kondoa District Land and Housing Tribunal)

BASHIRU HASSAN ....APPELLANT

VERSUS

HAMISI JUMBE.. RESPONDENT

JUDGMENT

17/5/2022 & 24/5/2022

KAGOMBA, J

The appellant, BASHIRU HASSAN, being aggrieved by the whole judgment and decree of District Land and Housing Tribunal for Kondoa at Kondoa (henceforth "Kondoa DLHT") has filed his Petition of Appeal with six grounds of appeal. However, as we shall indicate in due course, three of the six filed grounds of appeal were withdrawn during hearing and therefore the appeal is dependent on the following three remaining grounds:

1. That, the trial tribunal erred in law and fact for entertaining the matter while it was time barred.
2. That, the trial tribunal erred in law and fact for holding in favour of respondent because of lack of proof of written sale agreement.
3. That, the trial tribunal erred in law and fact by deciding the matter in favour of the respondent without visiting *locus in quo*.

The hearing of the appeal was scheduled to proceed during a special session set by the court for clearance of backlog cases. The court ordered the matter to proceed ex *parte* against the respondent after Ms. Maria Ntui, the learned advocate for the appellant, had prayed the court to order so following a no-show for over 90 days, of the legal representative of the respondent. On 26/10/2021 the court was informed of the death of the respondent by one Zabda Hamis Jumbe, who introduced himself to the court as a son of the deceased. The court had adjourned a couple of times to enable the deceased's family appoint the administrator to step into the respondent's shoes. There followed a long silence since then, hence ex-parte hearing.

Briefly, this case is about ownership of part of a three-acres piece of land located at Itolwa ward in Chemba District (henceforth "the suit land"). The respondent claimed before the Kondoa DLHT that he is the legal owner of the suit land which he obtained by clearing a forest in 1963. He said he has been in use of the suit land since then to 2017 when the applicant claimed ownership over the same. The respondent told the Kondoa DLHT that the applicant invaded three quarters (3/4) of an acre of the said land, cultivated on it and resisted eviction by the respondent. That, the respondent was using the land for cultivation and had built his residential house therein.

The appellant, on his side, told the Kondoa DLHT that he purchased the suit land from the respondent in 2006 but no documentation was done. He said there were "*minyaa*" tress which were planted as a boundary but the respondent destroyed the same and took an area of three (3) footsteps wide and thirty-five (35) footsteps long. Due to this dispute, the respondent filed the land application in the Kondoa DLHT seeking, *inter alia*, a declaratory order that he is the lawful owner of suit land as well as a permanent injunction against the applicant and his agents or any other person acting under his instruction from interfering with the suit land. After

trial, the Kondoa DLHT granted the application with costs having found that, on balance of probabilities, the applicant's testimony left a lot of questionable facts. It is this decision of Kondoa DLHT which has prompted the appellant to knock the doors of this court for further redress.

During *ex-parte* hearing of the appeal, Ms. Maria Ntui, prayed to drop the first, the third and the fifth grounds of appeal. She prayed to argue on second ground, which now becomes the first ground; the third ground, which becomes the second ground and the sixth ground, which becomes the third ground of appeal.

Submitting on the new first ground of appeal, Ms. Ntui argued that the said land application before the Kondoa DLHT was filed by the respondent out of time. She relied on the appellant's evidence which she said was corroborated by the testimony of Hindu Ramadhani who testified that the appellant bought the suit land in 2006, while the respondent filed his Land Application No. 3 of 2019 in Kondoa DLHT in 2019. She argued that a period of 13 years had already passed, while the limitation time for such an

application under item 22 of the third schedule to the Law of Limitation Act [Cap 89 R.E 2019] is 12 years.

On the second ground of appeal, Ms. Ntui submitted that the Kondoa DLHT erred to agree with the respondent merely because the appellant failed to produce a written sale agreement to prove his purchase of the suit land. She argued that the Law of Contract Act, [Cap 345 R.E 2019] does recognize oral agreements as one of the types of agreements. She argued that since the parties are relative, they normally agree on several matters orally and not by way of written agreements. She therefore submitted that the Kondoa DLHT was supposed to consider the truth of the evidence on appellant's purchase of the suit land, and not to reject it merely because of lack of a written agreement.

On the third ground of appeal, Ms. Ntui submitted that it was wrong for Kondoa DLHT to decide the application without visiting *locus in quo* because the dispute centered on boundaries. She argued that since the evidence adduced by the appellant at Kondoa DLHT showed that the respondent had taken some footsteps into his land and he has destroyed the

"*minyaa*" boundary, the visit to *locus in quo* was important to ascertain the nature of the dispute. Based on the above grounds, she prayed the appeal to be allowed.

Having heard the submission by the appellant's advocate and after careful perusal of the impugned judgment and proceedings of the Kondoa DLHT in light of the role of the court as the first appellate court, I am satisfied that my determination of the following two main issues will sufficiently dispose of this appeal:

1. Whether the Land Application No. 3 of 2019 before Kondoa DLHT was filed out of time.

2. Whether on the evidence adduced in the trial Tribunal, the respondent's case was sufficiently proved on balance of probabilities.

With regards to the first issue, the learned advocate for the appellant considers that the application filed by the respondent at Kondoa DLHT was

out of time because it was filed 13 years after the respondent had sold the suit land to the appellant. She reckoned that from the date of the purported sale to the date of filing the application in 2019, a period of 12 years set by the Law of Limitation Act had already elapsed. With due respect, I hold a different opinion. Section 5 of the Law of Limitation Act, Cap 89 RE 2019 provides as follows:

> **"5. Accrual of right of action**
>
> Subject to the provisions of this Act the right of action in respect of any proceedings, **shall accrue on the date on which the cause of action arises**". [Emphasis added].

From the above cited provision of the law, it is apparently clear that the date of purchase of the suit land, if there was such a purchase, by itself does not prompt the right of the respondent to sue and it cannot be relied upon in reckoning the time for purposes of the law of limitation. The time started to run against the respondent when the course of action arose. See the decision of Court of Appeal in **M/S P & O International Ltd vs. The Trustee of Tanzania National Parks (TANAPA),** Civil Appeal No. 265 of

2020, CAT at Tanga, [2021] TZCA 248 (09 June 2021). The same principle is the thrust of another decision of the Court of Appeal in **Kombo Khamis Hassan vs. Paraskeyoulous Angelo,** Civil Appeal No. 14 of 2008, CAT, Zanzibar, (Civil Appeal 17 (sic!) of 2008) [2009] TZCA22(07January 2009), to mention but a few. **Black's Law Dictionary** defines cause of action as "the operative facts giving rise to one or more basis for the suing: a factual situation that entitles one person to obtain a remedy in court from another person". As to when the cause of action arose in this case, it is a matter of scrutinizing the evidence, which is the duty of this court.

To properly determine whether the Land Application before Kondoa DLHT was filed out of time, I examined the evidence adduced in the Kondoa DLHT by the respondent as to what prompted him to file the application. The applicant testified as PW1 during trial. His testimony is recorded on page 4 to 5 of the typed proceedings of the Kondoa DLHT where he told the DLHT the gist of his application. He said the appellant had invaded his land. When he told him to leave the land the appellant said he had bought it. the appellant reported the matter to his Hamlet Chairman who advised him to take legal steps. The ward tribunal advised a peaceful settlement which did

not work. Hence, he decided to file the application at Kondoa DLHT. When cross-examined by the appellant, the respondent is on record replying that: **"you invaded that land this year".** As the date of the proceedings was 3/4/2019, the year of invasion which the respondent was referring to is, *ipso facto,* the year 2019.

The respondent further clarified that he agreed with religious leaders' decision to leave to the appellant another land, but the appellant still invaded his other land. this connects well with the respondent's other piece of testimony on page 5 of the typed proceedings of Kondoa DLHT where he gave a flash back of the dispute by stating that: **"the dispute started in 2017"**. He says, he took legal steps, the Kondoa DLHT quashed the Ward Tribunal's decision due to irregularities.

The take of the court from the testimony of the respondent in Kondoa DLHT is that there were sparks of disputes before the current one for which legal steps were taken alongside interventions by religious leaders and relatives. On page 6 of the typed proceedings, the respondent is revealing that he gave the appellant land comprising of a quarter (¼) of an acre but

the appellant invaded the respondent's other land, different from what he had given him. And the respondent was irritated by the appellant's claims that he bought the suit land from him.

Be what it may, whether the dispute arose in 2019 or 2017 as stated in the testimonies, the Law of Limitation Act, [Cap 89 RE 2019] will take the year 2019 or 2017 as the time to reckon in counting the period of 12 years under item 22 of the 3rd Schedule of the said Act. In either case, the twelve years' time for the respondent to file his Land Application in Kondoa DLHT had not expired. As I earlier observed, a mere date of sale does not ignite the counting of the time lapse, the date of course of action does. For this reason, I find no merit in the first ground of appeal, hence the first issue is answered in the negative.

On the second issue as to whether the respondent's case was sufficiently proved on balance of probabilities by the evidence adduced in the trial Tribunal, this is where this court as the first appellate court again comes in to evaluate the evidence on record. In this connection, the appellant's concern that the Kondoa DLHT disproved his claim of purchase

of suit land for lack of a written sale agreement to that effect, has to be looked at in the wide picture. While the appellant adduced his evidence to the effect that he bought three-quarters (¾) of an acre from the respondent, and that he paid him Tsh. 220,000/= as consideration, the respondent categorically denies such a sale. At this point the evidence stood like "appellant's word against the respondent's word". For clarity of records, it was the respondent who first questioned that there was no documentary evidence to prove the sale as appellant was alleging. It was from this flow of testimonies, the Kondoa DLHT picked the matter up after considering the entire evidence, and found that there was no documentary proof of sale.

It is true as argued by Ms. Ntui that the Law of Contract Act, Cap 345 RE 2019 recognizes oral agreements among the types of agreements. It should also be stated that for the appellant to satisfy the Kondoa DLHT that he bought the suit land through an oral agreement he had a duty to prove existence of that fact, on balance of probabilities. Conversely, if the appellant had a written agreement to show that he bought the suit land, he would be able to prove the existence of that fact despite oral denial by the respondent. This is the context within which the decision by Kondoa DLHT can be viewed.

It is the view of this court that, whether or not the Kondoa DLHT was wrong in disestablishing the existence of a sale for a mere reason that the agreement was not written, does not disqualify its decision provided it was otherwise proved, on balance of probabilities, that the respondent was the lawful owner of the suit land. What is important here, in my view, is to scrutinize the evidence on record, for both parties, to see whether the Kondoa DLHT reached a right decision with regards to this dispute.

The court has thoroughly read the evidence adduced during trial at Kondoa DLHT. It is trite law that every witness deserves credence, unless proved otherwise. This principal was well stated in the case of **Goodluck Kyando V. Republic [2006] TLR 363**, and the Court is thus guided accordingly. I have reviewed what was said by the respondent when he testified in Kondoa DLHT as PW1. His testimony has helped the court in determination of the first issue. Apart from the respondent's testimony, Zabda Hamisi Jumbe (PW2), testified to the effect that the appellant was welcomed by the respondent to the suit land. He was allowed to build a temporary house to stay for one year only. He overstayed and resisted to give vacant possession; hence legal steps taken by the respondent. PW2

testified further that he witnessed the respondent giving a quarter (¼) of an acre to the appellant, who later elongated his tentacles to another piece of land belonging to the respondent. That, the appellant stretched his desire for more land so much so that the area under the appellant's occupation was enlarged to three-quarters (¾) of an acre, without respondent's consent.

PW2 shed more light that because of appellant's expansionist behavior, the respondent decided to sue for the entire land, including the quarter (¼) of an acre he had given to the appellant earlier. PW2 further reveals that legal steps were not taken instantly because they had no doubt with the appellant who is the respondent's relative, rather, such steps were taken when the appellant wanted to sell the suit land and after invasion of another land belonging to the respondent in the same area.

The testimony of PW2 was largely corroborated by the testimony of Adaiwa Shabani, who testified as PW3. She told the Kondoa DLHT that the suit land is owned by the respondent and the appellant wanted to take it forcefully. She further told the trial Tribunal the appellant was temporarily allowed to build in a small area of a quarter (¼) of an acre but crossed the

set limits into another land of the respondent. PW3 testified further that, she also witnessed the appellant being given the land by the respondent, saying that the appellant was at first living at Kidoka area with his parents.

The above testimonies by the respondent's witnesses points out to one major fact, that the respondent was the owner of the suit land and the appellant was an invitee. As I shall demonstrate below, this conclusion prevails as a finding of fact by this court despite the testimony of the appellant that he purchased the suit land.

For the appellant's side, the testimonies to prove that the appellant bought the land from the respondent was adduced by the D.W.I – the appellant himself, D.W.II- Saidi Kijungu Juma and D.W.III Hindu Ramadhani Kumbi. For reasons that will come to light soon, I start with the testimony of D.W.II – Saidi Kijungu Juma. It was testified by D.W.II that the appellant was given a plot by the respondent in 1976 to build a house. He witnessed the hand over. After hand over, he went home. Then, the appellant planted "*minyaa*" trees as a boundary mark but the respondent cut them down.

While clarifying to the gentlemen assessors, D.W.II said that in 1972 he found the respondent living in the suit land. That, the appellant was given approximately one and half (1½) acres, which was located approximately 300 meters from the respondent's and that the area of the respondent was approximately two and half (2½) acres. He also said, the appellant is a son of the respondent's brother. At this juncture this court observes that D.W.II did not testify to prove that the appellant bought the land from the respondent. As such, D.W.II did not assist the appellant to prove his major claim that he bought the land from the respondent. It remains to be seen if D.W.I and D.W.II proved this claim.

The appellant and his wife testifying as D.W.I and D.W.II respectively, in effect told the Kondoa DLHT that the appellant purchased the suit land from the respondent in 2006. That, the size of the area purchased was three-quarters (¾) of an acre. It was their collective evidence that in 2016 the respondent encroached into the appellant's land by taking some of it. It was for this reason, the appellant reported the matter to Kitongoji Chairman and the matter was referred to the Ward Tribunal for Jangalo ward, which entered judgment in his favour. In 2019 the respondent sued the appellant

at the Kondoa DLHT. Asked about the evidence of purchase of land, the appellant told the trial Tribunal that they did not put their agreement in writing. The appellant further said that he paid Tsh. 220,000/= to purchase the suit land and that D.W.III was present during the said purchase.

It is the view of the court that the testimony of D.W.I with regard to his key claim of purchase of the suit land, in absence of a written sale agreement and proof of payment of consideration thereof, required corroboration. The only witness that was available to corroborate D.W.I's testimony was D.W.III- who is the wife of D.W.I. It is now settled that testimonies should not be discarded merely because witnesses are related to each other. (See **Samwel Wilfred Mushi vs Republic,** Criminal Appeal No. 236 of 2007 (unreported). What is important is the credibility of the said witnesses. (See **Saada Abdallah and Others vs Republic** (1994) TLR 132; **Juma Senge v Republic,** Criminal Appeal No. 164 of 2008; **Paulo Tarayi v Republic,** Criminal Appeal No. 216 of 1994; **Deo Bazili Olomi v Republic,** Criminal Appeal No. 245 of 2007; **Rashidi Omari v Republic,** Criminal Appeal No. 289 of 2009 – all unreported).

However, in this case the testimonies adduced to support the appellant's claim that he purchased the three quarters (3/4) of an acre from the respondent has hopelessly fell short of proving the allegation. For this reason, the appellant's claim that he purchased the land should collapse. What remains as an established fact from the entire evidence adduced during trial is the fact that the appellant was an invitee to the suit land.

The Court of Appeal has deliberated in details the legal implication of a battle for ownership of land between a land owner and an invitee in the case of **Mussa Hassan V. Barnabas Yohanna Shedafa (Legal Representative of the Late Yohanna Shedafa),** Civil Appeal No. 101 of 2018, CAT, Tanga. Also, the position that an invitee cannot exclude the host was long stated in the cases of **Mkakofia Merinanga v. Asha Ndisia** (1969) HCD n. 204 and **Swalehe v. Salim** (1972) HCD n. 140, where it was stated thus;

> "No invitee can exclude his host whatever the length of his occupancy."

As I stated earlier in this judgment, this appeal was heard *ex-parte*. In **Kalyango Construction and Building Contractors Limited v. China**

Chongouing International Construction Corporation (CICO), Civil Appeal No. 29 of 2012 (Unreported) the Court of Appeal held as follows:-

> "The appellant was the one who sued the respondent. Regardless of whether the matter preceded ex-parte or not, he had the duty of proving the case against the respondent on the standard required".

In this appeal the evaluation of the evidence adduced by the appellant during trial has found the same to be wanting corroboration and credence. The appellant has failed to prove that he bought the suit land from the respondent, which was his main claim. In the circumstances, I find the appeal devoid of merits. There is no reason to overturn the decision of the Kondoa DLHT but I uphold the same for reasons stated. Accordingly, the appeal is dismissed. As the parties are relatives, I abstain from ordering costs.Order accordingly.

Dated at Dodoma this 23rd of May, 2022

ABDI S. KAGOMBA

JUDGE