

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
LAND APPEAL NO. 17 OF 2020**

(From the Decision of the District Land and Housing Tribunal for Rukwa at Sumbawanga in Land Application No. 02 of 2018)

VICENSIO DAVID.....APPELLANT

VERSUS

ERNEST NGENJE.....RESPONDENT

JUDGEMENT

Date of Last Order: 30/ 06/ 2022

Date of Judgement: 29/07/2022

NDUNGURU, J

This is a first appeal. The matter has its background at the District Land and Housing Tribunal for Rukwa at Sumbawanga (henceforth the trial tribunal) where the appellant sued the respondent claiming trespass by respondent over 50 acres of his land (disputed land). The trial tribunal found the respondent to be the lawful owner of the disputed land.

Aggrieved by such victorious decision on the part of the respondent, the appellant preferred this appeal with a memorandum of

appeal comprised of eight (8) grounds of appeal which are quoted hereunder;

1. *That, the District Land and Housing Tribunal erred in law and fact by holding that the dispute land belong to the respondent, while the appellant is lawful owner of suit land in dispute as stated that, in 1954 he was born and found that his father used that land till he grown up and also himself utilised the same up to date when the respondent intruded the land in question.*
2. *That, sumbawanga District Land and Housing Tribunal erred in law and fact and without considering the evidence adduced during the hearing of this matter where the appellant called upon two witnesses where they testified that the land in question belong to the applicant and they testified that the respondent trespassed the suit land.*
3. *That the Chairperson of District Land and Housing Tribunal erred in law and fact to declare that the lawful owner is respondent without considering that the evidence of respondent is not strong any more, as he called one witness Chrisant Ndenje who told that he was born at Mvula the place which is*

different to Mtakuja where there is land dispute.

- 4. That the Chairperson erred in law and fact by holding that the respondent is lawful owner of suit land while did not have any witness to support his allegation, and without considering that the boundary of the land in dispute is river crossing between which is called river Msakamwa.*
- 5. That, the District Land and Housing Tribunal erred in law and fact were stated that the dispute over the ownership of the suit land emerged in 2017 and that it has 29 years, this is not true it is three years passed and the respondent have not occupied the suit land in dispute for more than 18 years.*
- 6. That the District Land and Housing Tribunal erred in law and fact by upholding that the respondent used the suit land since 1988 and had erected a house, the house erected at the place respondent resides, and not at the suit land of appellant, hence there is contradictory on that allegation.*
- 7. That, the District Land and Housing Tribunal erred in law and fact and without considering that criminal court is not proper forum. In 1992 the respondent sued the appellant's*

uncle and appellant's sister at Mwazye Primary Court and Mpui Primary Court.

8. That, District Chairperson of Land and Housing Tribunal erred in law and fact by disposing this matter without involving assessors as the law direct the chairperson disposed this matter herself which is not fair for the interest of justice.

When the appeal was at the hearing stage, the appellant had a legal service of Mr. James Lubus, whilst the respondent defaulted to enter appearance, thus the hearing was decided to proceed *ex-parte* hearing.

Submitting in respect of 1st, 5th and 6th grounds of appeal altogether, Mr Lubus submitted that the evidence on record show that the appellant was born at the disputed place called Mtakuja in 1974 and thus he had been at that suit land, and possessed the same from 1974 till when he went for treatment at Dar es salaam in 2016 when the respondent invaded the suitland. Mr Lubus further submitted that under the principle of adverse possession could have applied to declare the appellant as the lawful owner as he stayed there for 32 years. He referenced the case of **Didas Kauzeni vs Oscar Kauzeni**, Misc. Land

Appeal No. 2 of 2019, **Ramadhan Makwega vs Theresia M. Mshuza**, Misc. Land Appeal Case No. 3 of 2018, HC.

Mr Lubus was of the view that the appellant enjoyed the land continuously exclusively. The appellate tribunal misdirected itself when started counting the dispute from 2016. He had to know who was in possession of the said suit land at that particular time. Further he said the appellant filed the case in 2017 having noted that the respondent had trespassed. Thus, the adverse possession had to be accounted from 2017.

As regards the 2nd, 3rd and 4th grounds, Mr Lubus submitted that the evidence of the respondent was very weak to establish his ownership. His evidence contradicted with that of his witness. He added that Mwazye and Mpui Primary Courts are very far from each geographically. The evidence of PW1, PW2, PW3 and that of the appellant corroborated each other that the suit land was occupied by the appellant but the respondent invaded it in 2016 when the appellant went to DSM for treatment contrary to the evidence of the respondent and his witness. That duration of period the appellant had occupied started ever since he was born at that suit land.

As regards the 7th ground of appeal, he submitted that the respondent never produced any court document to prove that he sued the appellant's uncle and sister at Mwazye and Mpui Primary Courts.

Finally, he prayed for the court to find that the appellant proved the case before the trial tribunal to the balance of probability.

Now the main issue for determination before this court is whether the appeal is meritorious.

In any civil litigation, it is a principle of the law that he who alleges must prove that those facts exist. This is provided under the provision of section 110 (1) of the Law of evidence Act, Cap 6 RE 2019.

Admittedly, this being the first appeal the court has a duty to re-evaluating the evidence adduced before the trial tribunal for the purpose of being able to determine the grounds of appeal quoted herein above. The power of the court to do so was stated in the case of **Yasin Ramadhan Chang'a vs Republic** [1999] T. L.R 481, **Deemay Daat & 2 Others vs Republic** [2005] T.L.R 132 where the court held that: -

An appellate court is entitled to look into the evidence adduced before the trial court and make its own findings when there is mis-direction and

*non-direction or the lower court misapprehended
the substance, nature and quality of evidence.*

The appellant testified before the trial tribunal as PW1 and he went on testifying that he was born at Mtakuja 1954 and was born on that suit land. That in a year 2016 his in-law got sick thus took her for treatment at Muhimbili National Hospital in November. That in January 2017 he got a phone call and he was told someone has trespassed on the suit land. He informed his neighbours to tell the trespasser to vacate therefrom, however they could not as they afraid of the trespasser. In September 2017 he returned back and found the suit land is being cultivated. Then he decided to sue the trespasser at the trial tribunal.

On being cross-examined the appellant stated that he sued the person he found cultivating in his suit land and he had no any exhibit for the that fact.

On being asked by the assessors, and the Chairman the appellant stated that the suit land which is in dispute is 50 acres located at Mvula village, Katazi ward and that the respondent is not his relative and the same he inherited from his father one Kalolo Chaila when he attained 18 years. The suit land belongs to his family. That his father died in 1986.

Venance Sokoni, was appellant's witness who testified as PW2. He testified that he once lived at Mtakuja, Katazi Ward. That in a year 1974 he shifted to Ninga. That in a year 2017 the applicant travelled to DSM and after his return he found the respondent had trespassed on the suit land. The appellant sued the respondent at the Katani Ward Tribunal; however, the respondent did not appear, thus he sued him at the trial tribunal.

Noel Yamba, testified as PW3. He informed the trial tribunal that the suit land has been trespassed in a year 2017. He is on the west of the suit land while the appellant on the east. PW3 told the tribunal that he has a land adjacent to the appellant's land.

On cross-examination, PW3 stated that the appellant was at DSM when the suit land was trespassed in 2017 and that the appellant's wife was at home when the appellant went to DSM. PW3 further testified that the neighbours to the suit land including him, venance sokoni, Ranusi and Ephraim Kalipesa.

Ernest Ndenje was a respondent who testified as DW1 and he testified that he was born at Mvula. During his youth he used to visit the suit land with his parents. After got married in 1988 he continued using the suit land. In 1992 the uncle of the appellant one Dominiko Chaila

trespassed on the suit land. He sued him at Mwazy Primary Court and left the suit land to him. In 2002, the sister of the appellant Lonia David trespassed on the suit land he sued her at Mpui Primary Court. In 2017 the appellant found him cultivating on the suit land. He was told to stop using the suit land and he reported to the Ward Executive Officer. The appellant and his relatives were summoned and they promised not to harass him. Then he was sued at the trial tribunal.

The respondent's witness Chrisant Ndenje testified as DW2. He testified that that after his birth he found the respondent's father is using the suit land. He said the respondent also used the suit land. He stated that his father gave them the suit land, also the family of Nicholaous Njawala is using the suit land. He said the respondent is living on the suit land and he has erected a house thereon.

On cross-examination, DW2 stated that the houses were erected on the suit land before the dispute on ownership emerged. He is the oldest brother of the respondent who is the lawful owner of the suit land.

Now the duty of this court is to determine whether basing on the weight of evidence adduced before the trial tribunal the decision of the tribunal deserved to stand or not.

As for the first and second issues, respectively it is very clear that the appellant testified to have been born in 1954 at the suit land, and possessed the suit land since 1974 till when he went for treatment at Dar es salaam in 2016 when respondent invaded the suit land. The appellant described on how he came into possession of such suit land, the appellant claimed to have inherited from his father. His two witnesses PW2 and PW3 stated that while the appellant went to Dar es salaam in a year 2017, the respondent trespassed therein. PW3 stated he is among the neighbours to the suit land owned by the appellant, that he is on the west of the suit land. Others neighbours are venance sokoni, Ranusi and Ephraim Kalipesa.

It is my firm consideration that in the trial tribunal's decision there is a misdirection or non-direction on the evaluation of evidence by the appellate tribunal. Upon reconsideration of the above testimony, I see the appellant proved as regard his possession of the suit land and for how long.

The evidence of the appellant PW1 above was strong as regards on how he came into possession of the suit land. The respondent's evidence is to the effect that after he married in 1988, he continued using the suit land which was used by his parents. The respondent told

the tribunal for the two occasions, the relatives of the appellant invaded the suit land in a year 1992 and 2002.

The respondent's evidence was corroborated by his witness, DW2 who introduced himself as the oldest brother of the respondent. DW2 testified at the tribunal that DW1 is the lawful owner of the suit land and informed the tribunal that there are houses erected on the suit land even before the dispute arose over ownership. DW2 told the tribunal that DW1 was given the suit land in 2000.

As regards non-involvement of assessors, the tribunal was very clear in its judgement and proceedings that the matter was concluded under provisions of **section 23 (3)** of the Land Disputes Courts Act, Cap 216 RE 2019, by giving reasons that both the assessors Mrs. T. mzindakaya and Mrs. J. Michese resigned. Thus, the ground is devoid of merit.

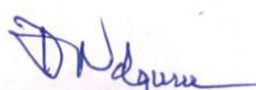
In addition, the court has found the evidence of the appellant established ownership of the land in dispute as he was born at the suit land in 1954 and the same, he inherited from his father one kalolo Chaila when he attained 18 years, and his testimony was supported by evidence of Venance Sokoni, PW2, and Noel Yamba, who are neighbours.

To the view of this court the above stated evidence was enough to tilt the balance of probability to the side of the appellant when compared to the evidence on the side of the respondent that the land in dispute is the property of the appellant.

Consequently, I find merit in the appeal filed in this court by the appellant and I now reverse the decision of the District Land and Housing Tribunal for Rukwa by declaring the appellant as the rightful owner of the suit land. The appeal is allowed. Costs in this matter is to follow event.

It is so ordered.




D. B. NDUNGURU

JUDGE

29.07.2022

Date - 29/7/2022
Coram - Hon. K.M. Saguda – Ag, DR
Appellant - Present
Respondent - Present
B/C - J.J. Kabata

Court: The judgment is delivered before the parties on 29/07/2022.




K.M SAGUDA

Ag, DEPUTY REGISTRAR

29/07/2022