

**IN THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**SUMBAWANGA DISTRICT REGISTRY**  
**AT SUMBAWANGA**  
**MISC. LAND APPEAL NO. 15 OF 2021**

*(Originating from Decision of the District Land and Housing Tribunal for Katavi at Mpanda in Land Appeal No. 68 of 2020 Original Land Dispute No. 65 of 2020 at Inyonga Ward Tribunal)*

**SAIDI FADHILI.....APPELLANT**

**VERSUS**

**ELIASI KASANGANI.....RESPONDENT**

**JUDGEMENT**

*Date of last Order: 26/05/2022*

*Date of Judgment: 29/07/2022*

**NDUNGURU, J.**

This is a second appeal. The matter has its genesis from Inyonga Ward Tribunal (henceforth the trial tribunal). At the trial tribunal the appellant herein unsuccessfully sued the respondent claiming ownership of piece of land (henceforth the disputed plot). Dissatisfied the appellant unsuccessfully appealed to the District Land and Housing Tribunal for Katavi (henceforth the Appellate Tribunal) where the respondent was declared the rightful owner of the disputed plot.

Aggrieved by the appellate tribunal decision, the appellant has preferred this appeal by lodging the following grounds of appeal;

- 1. That the appellate tribunal erred in law to read the judgement and decree in absence of the tribunal assessors.*
- 2. That the appellate tribunal erred in law and fact by holding that the respondent is the owner of the suit land by virtue of adverse possession and that all factors to invoke the principle of adverse possession were not met by the respondent.*
- 3. That the appellate tribunal erred in law and fact that by its failure to appreciate the fact that the respondent did not have any document or witnesses to prove that he was given the suit land.*

As this appeal was called on for hearing, the appellant had a legal service of Mr Lawrence John, learned advocate whilst the respondent had a legal service of Mr. Sindamenya, learned advocate. The hearing proceeded orally by each party to argue his case.

Mr. Lawrence John submitted as regards the first ground that the composition of the tribunal is the Chairman and less than two assessors. That one assessor Beatrice was not present when judgement was delivered, further her opinion was not considered in the judgement. Thus, the Chairman and the assessors were not at one in what the Chairman based his decision.

On the second ground, he submitted that the duty of the appellate court is to evaluate the evidence of the trial court as per the case of

**Abdullaim Haji vs Raymond Nchimbi Alyoce & Another** [2006]

TLR 419 and **Shantilah M. Luwalah vs Republic** [1957] E.A 570.

Mr Lawrence John submitted that the respondent being an invitee, after given land by one Fadhil cannot in law claim to own the land under adverse possession, thus the appellate tribunal came to an erroneous decision as per the case of **Nukyemakila and Thadeo vs Railanga** [1972] HC. No. 4.

Mr Lawrence referred this court to the case of **Registered Trustees of Holy Spirit Sisters of Tanzania vs January Kamili Shayo & 136 Others**, Civil Appeal No. 193 of 2016, CAT, Unreported where the court set 8 criteria which must be complied with for the principle of adverse possession to apply, which the appellate tribunal failed to observe.

As to the third ground, Mr John submitted that no any documentary evidence / proof on how he acquired the land. It was his burden to prove that he was given the disputed plot by one Fadhil. The respondent did not call any witness to testify on that.

Finally, he prayed for the appeal be allowed with costs.

In reply, Mr Sindamenya resisted the appeal. As to the first ground he submitted that there is no any requirement of law for the judgement

to be read in the presence of assessors. The legal requirement is for the assessors to give their opinion as per the Reg 19 (1) (2) of the Land Disputes Courts Act Regulation.

As to the second ground, he submitted that basically the disputed plot belongs to Seif Fadhil who died in 2001. The complainant Said Fadhil who is the next son of Seif Fadhil. Thus, Said Fadhil has no capacity to claim for the ownership in his capacity, unless he could have letter of appointment of administration of Estate of Seif Fadhil.

Mr Sindamenya was of the view that all factors mentioned in the case of **Registered Trustees of Holy Spirit Sisters of Tanzania** [supra] were met in the case at hand, thus the appellate tribunal was correct to apply the principle of adverse possession. That there had been absence of possession by the true owner, there was no interruption, thus the principle applies.

In addition, Mr Sindamenya introduced the defence of acquiescence as per the case of **Duke of Leeds vs Amhast** [1986] ER 41. That Fadhil left the land to the respondent he never demanded it back till when he died. The respondent was given it in 1998, the appellant has demanded it in 2020 which is 20 years later without any colour of right. Thus, the tribunals below were right to declare the

respondent lawful owner of the plot. There was no any probate case, the respondent was not an administrator of estate.

On the third ground, he submitted that the land is located at the remote village and the respondent was offered it in 1998. Likewise, it was a family matter thus there was no any need of writing. The people who testified on behalf of the respondent are quite enough to prove the respondent ownership of land. There is evidence that the respondent requested that piece of land to Fadhil who gave him. There is no any doubt as to whether Seif Fadhil gave respondent the disputed plot.

Further, Mr Sindamenya submitted that there is evidence of Fransisco Mparasinge who accompanied the respondent to Seif Fadhil to request for that piece of land. There is another witness one Revocatus Kasangani who witnesses the handing over of the piece of disputed plot. Anna Patrick the sister of Seif Fadhil assisted the respondent to plant trees after being given the piece of land. The counsel was of the firm view that in such situation there was no need for writing. Thus, he prayed for the appeal be dismissed with costs.

In rejoinder, Mr John reiterated the argument that in composing the tribunal judgement the tribunal was not composed as per section 23 (1) of the Land Disputes Courts Act.

As to the second ground, he said the criteria for adverse possession were not met and that the respondent confused the court as to whether he was given the disputed plot or owned it under adverse possession. Further he submitted that the principle of acquiescence and the case cited is a mere persuasive, but also distinguishable from the facts at hand.

It was his further rejoinder that the case at Inyonga Ward Tribunal was the redemption of family if section 18 (2) of the Land Disputes Courts Act, Cap 216 allows it. Thus, to his view there was no need for appointment of administrator. Section 56 of the Probate does not apply in the circumstances.

As to the third ground, Mr John still insisted that there was a need for documentary exhibit. Also, no independent witness who testified to have inherited the handover, thus he finally prayed for the appeal be allowed with costs.

I have keenly followed the arguments of the learned counsel for the both parties and I have read between the lines the appellant grounds of appeal and the entire proceedings of the tribunals below.

Let me, first start addressing the first complaint by the appellant that the appellate tribunal erred in law to read the judgement and

decree in absence of the tribunal assessors who heard the case. With respect, I may say this is a new ground of appeal which is raised for the first time in this second appeal. It has been the position of the law that matter which had not been raised or discussed in the first appeal cannot be raised in the second appeal like this one. This new ground which neither raised by the trial tribunal nor on first appeal by appellate tribunal, therefore, the issue can be said to be of no worth to be considered and determined by this second Appellate Court. There is a chain of authorities which have taken that stance. See cases of **George Mwanyigili vs Republic**, Criminal Appeal No. 335 of 2016, unreported, **Juma Manjano vs Republic**, Criminal Appeal No. 211 of 2009, unreported, **Sadick Marwa Kisase vs Republic**, Criminal Appeal No. 83 of 2012, unreported, also the case of **Alfred Nyaoza vs Salvatory Mwanabula**, Misc Application No. 3 of HC at Sumbawanga, in **Juma Manjano** (supra) the Court held that: -

*"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. in the case of **Abdul Athuman vs Republic** [2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the*



*High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal therefore struck out."*

*"The Court has repeatedly held that matters not raised at the first appellate court cannot be raised in a second appellate court."*

The purported ground as regards involvement of assessors is of no worth at this stage as a ground of appeal, even learned advocate for the respondent did not take notice of that, thus devoid of merit.

Now coming to the second complaint that the principle as regards adverse possession was wrongly invoked on the side of the respondent. Am in agreement with the learned advocate for the appellant that it was wrong for the appellate tribunal to rely on the principle of adverse possession in its decision as the respondent occupied the disputed land from 1998 to 2020 which is almost 22 years undisturbed, thus he is entitled to the disputed land by adverse possession.

However, in the instant case, the records shows that the respondent's occupation in the disputed land was authorized by the respondent's grandfather one Seif Fadhil (deceased). Thus, permission or consensual occupation cannot amount to adverse possession. With this stance I subscribe to the position in the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo**



**and 136 Others** [supra]. The case at hand does not meet the criteria set out in the cited case above.

In the case of Jackson **Reuben Maro vs Hubert Sebastian**, Civil Appeal No. 84 of 2004, CAT Arusha, it was stated that: -

*"In adverse possession there must be an act or conduct on or relating to the property which is inconsistent with the rights of the owner and which is not authorized by the owner."*

The respondent herein was authorized to occupy and use the disputed plot as per the records of the tribunals below.

Having said above, I ask myself weather the respondent was invitee or a person who had exclusive legal ownership of the disputed plot?

The appellant one Said Fadhil and his sole witness one Anna Fadhil claimed and testified at the trial tribunal that the respondent Elias Kasangani sold the disputed land to third party without the consent of the family as the plot is the family matter. That Seif Fadhil who was grandfather of the respondent granted the disputed land for occupation only to the respondent.

However, the respondent Elias Kisangani disputed the allegation by the appellant and his witness, instead he claimed to have been granted exclusive legal ownership of the same by his grandfather one Seif Fadhil in the absence of Anna Patrick Fadhil. His first witness one Francis Mpalasinge testified that the respondent was granted the disputed land for purpose of erecting a house. His second witness one Revocatus Kasangani testified that the respondent was granted the disputed land by Seif Fadhil in front of him, John Mpalasinge and Anna Patrick. He further testified that the respondent was granted the disputed land for purpose of erecting a house. However, Anna Patrick did not support the version testimony of the respondent that she witnessed the grant of the disputed plot.

According to the record, the disputed land was under the control and supervision of Seif Fadhil who handled the same to the respondent. The respondent erected a house therein in 1998 while appellant and his fellows were there seeing. The appellant did not claim the disputed land when his father Seif Fadhil was still alive and it is not clear as to why he wants it now after more than 20 years had passed.

In my view, the appellant's claim has no legal justification because in the first place it is time barred considering the fact that the respondent had been occupying the same plot since the year 1998 when

he was granted by his grandfather. According to the Law of Limitation Act, Cap 89 RE 2019 the time limit for recovery or redemption land is 12 years. It is on record that this suit was filed in Inyonga Ward Tribunal in 2020 which is almost 22 years reckoned from 1998. Also, the records show that the disputed land was not under possession of or use by the appellant.

In the light of the above testimony, it would be grossly unfair after such a long period to disturb the respondent. See the case of **Shabaani Nassoro vs Rajabu Simba** [1967] H.C.D 233. The plot has become the property of the respondent by virtue of long occupation for 22 years. The appellant is barred by the doctrine which permit a person to acquire an interest in property by long uninterrupted possession and use (vide **The Customary Land Law of Tanzania**, a Source Book by W. James and G. M. Fimbo at page 533; the Learned Authors state that;

“Received law permits a person to acquire an interest in property by long uninterrupted possession and user...”

Having said all that, i have not seen any circumstances that compel this court to interfere with the concurrent findings of fact of the two tribunals below that the respondent had been in a long and uninterrupted occupation of the disputed land.

In view of the foregoing, I find this appeal has no merit. Thus, it is hereby dismissed. I make no orders as to costs. Taking into account that the parties are relatives, to award costs is to cultivate the spirit of the hatred to them

It is so ordered.



  
**D. B. NDUNGURU**

**JUDGE**

**29. 07. 2022**

Date - 29/7/2022

Coram - Hon. K.M. Saguda – Ag, DR

Appellant - Absent

Respondent - Present in person

B/C - J.J. Kabata

**Order:** The judgment delivered this on 29/07/2022 in the presence of parties through Video conference while appellant absent.



  
**K.M SAGUDA**  
**Ag, DEPUTY REGISTRAR**

**29/07/2022**