IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

MISC. LAND APPEAL NO. 56 OF 2021
(Arising from Land Appeal No 36 of 2019 by the District Land and Housing Tribunal of Manyoni at Manyoni, Original Land Case No. 05 of 2019 of Isseke Ward Tribunal)

JOYCE MWAJA..... APPELLANT

VERSUS

HABIBU KAMSAWA.....RESPONDENT

JUDGMENT

26/05/2022 & 23/06/2022

KAGOMBA, J

Joyce Mwaja ("appellant") has filed her second appeal in this matter, to challenge the decision of the District Land and Housing Tribunal of Manyoni at Manyoni, ("Manyoni DLHT") which was made in favour of Habibu Kamsawa ("respondent"). The filed grounds of appeal are:-

1) That, the Manyoni DLHT erred in law and facts by upholding the decision of the trial Tribunal which infringed the appellant's right to be heard by denying her key and credible witness testimony hence arrived to unjust decision.
2) That, the Manyoni DLHT erred in law and facts by failure to consider the issue of adverse possession since the appellant had been in use of the disputed land for twenty-eight years (28), a fact which was ignored by the trial Tribunal.

3) That, the Manyoni DLHT erred in law and facts by upholding the decision of the trial tribunal which had disregarded appellant's watertight evidence compared to the respondent's weak evidence.

Before going further in determination of this appeal, facts of the case need to be stated even briefly. At the Isseke Ward Tribunal ("the trial Tribunal") the appellant sued the respondent for unlawfully evicting her from her land without good cause. It was alleged that in 1998 the appellant and her husband Peter Mwaja (now deceased) negotiated with Yacobo Chiyanga who was the original land lord (also deceased) for a piece of land to build a house. While they were only three of them, the late Jaco Chijanga is alleged to have agreed to sale to the couples the land in dispute for Shillings Fifteen Thousand (Tsh. 15,000/=) which was paid by the couples in two installments of Shillings Ten Thousand (Tsh. 10,000/=) first and later Five Thousand Shillings (Tsh.5,000/=). The wife of Mr. Chiyanga also demanded to be paid the same amount of Shillings Fifteen Thousand (Tsh. 15,000/=) and was so paid, hence the total consideration was Shillings Thirty Thousand only (Tsh. 30,000/=). The appellant and her deceased husband built their house on the land in dispute and stayed there peaceful since 1998 up to 2013 when the dispute over the land emerged. However, the appellant told the trial tribunal that in 2018 she was told to vacate the land for reasons not known to her.

The respondent on his part told the trial Tribunal that in 2011 the family of the late Yacobo Chiyanga offered to sell him one care from the land of the late Yacobo Chiyanga. The sale agreement was signed by the sellers and the buyer and witnessed by the Village Executive Officer. Upon enquiring as to the house that was built on the land, the family of the late Yocobo

Chinyanga told him that it was not a problem because the late Peter Mwaja, who is the appellant's husband, had asked to build a temporary house. With that explanation, the sale agreement was executed and the appellant's husband was notified that the land in dispute would now be under the ownership of the respondent. In 2018 when the respondent saw that his house was to be demolished to leave way for the road, he informed the appellant not to build and that she should look for another area. A dispute arose and was reported to Village Land Committee on 4/8/2018 where the appellant, using the name of Asha Mwaja, admitted that the land belongs to the respondent and agreed to vacate on 30/7/2019. When that date came, there was no compliance and she decided to file the land suit against the respondent at the trial Tribunal. After a full trial, the trial Tribunal found, among other things, that the appellant had failed to furnish evidence to prove her claim of ownership but the respondent's claim was proved by credible evidence. Hence, the trial Tribunal entered judgment for the respondent, a decision that was upheld by the Manyoni DLHT, hence this appeal.

During hearing, Ms. Neema Ahmed, learned advocate represented the appellant while Mr. Godfrey Wasonga, also learned advocate, represented the respondent. Ms. Ahmed, prayed to drop the first ground of appeal. she therefore argued only on the second and third grounds of appeal.

On the second ground of appeal, which becomes the first ground, Ms. Ahmed submitted substantially the same narration as recorded in the background facts above. She highlighted that the source of the dispute is the sale of the suit land to two different buyers at two different times. That,

in 1998 the appellant and her husband the late Peter Mwaja bought the suit land from the late Yacobo Chiyanga. The sale was done locally without a written Sale Agreement. That the couple built a house and lived therein peacefully thenceforth until in 2011, when it is believed that the respondent bought the same piece of land from Benjamin Yacob and his mother Dora Kimbiko, as joint sellers. That the respondent bought the land in dispute while the appellant's house was already built thereon.

Ms. Ahmed submitted that the Manyoni DLHT erred to uphold the decision of trial Tribunal by merely considering the documentary evidence particularly the Sale Agreement without considering that the appellant has been in long occupation of the land before it was sold to the respondent.

She further submitted that the Manyoni DLHT did not consider the proceedings of the trial Tribunal where the gentlemen assessors asked whether appellant was involved during the sale of land to the respondent, and the respondent replied in the negative, despite the fact that the appellant's house was there when he was buying the land.

Ms. Ahmed further faulted the legality and *locus standi* of Benjamin Yacob and Dora Kimbiko to sell the land while it had already been sold by Benjamin's father, a matter which she said the Manyoni DLHT failed to consider, despite the gravity of the question raised by the gentlemen assessors.

Submitting on the second ground of appeal, Ms. Ahmed argued that the Manyoni DLHT erred to consider a document tendered at the Ward

tribunal which is believed to be made by the relatives of the late Peter Mwanja to prove that the appellant said she was residing in the suit land temporarily but the real owner is the respondent. She said the document is a contemptuous exhibit which the Manyoni DLHT erred to use it as evidence to pronounce the respondent is the real owner of the land in dispute. She argued that at the trail Tribunal even the assessors questioned Mr. Gervas Mwanja (PW2) on the legality of the said document. She said that, the said document which bears no date and which is not known whether it is the minutes or a letter shouldn't have been given such a heavy weight by Manyoni DLHT.

Ms. Ahmed argued that since the appellant was living in the suit land since 1998, a fact which was not disputed by the respondent, the Manyoni DLHT erred to uphold the decision of the trail Tribunal by relaying on the Sale Agreement. She prayed the court to quash the decision of Manyoni DLHT.

Mr. Wasonga for the respondent, replied. He started his submission on the first ground by pointing out what was prayed by the learned advocate for the appellant in this court is to quash the decision in Land Appeal No. 36 of 2019 only but not the decision of the trial Tribunal. Hence, the latter stands unchallenged. He added that the same thing happened even in the Petition of Appeal.

Mr. Wasonga then countered the use of the principle of adverse possession by the appellant. He argued that adverse possession arises where a person had trespassed into someone's land for more than twelve (12)

years. He argued further that since in the third ground of appeal the appellant alleged that she bought the land in dispute in 1998 by oral agreement, then she cannot say she trespassed. For that reason, Mr. Wasonga submitted that the second ground of appeal should fail since the adverse possession principle does not apply to the facts in the appellant's case.

On the third (now second) ground of appeal, Mr. Wasonga submitted that while the appellant's advocate challenges the documents relied upon Manyoni DLHT for not showing the date, size of the land and even boundaries, even the appellant's oral purchase agreement does not show such details. He added that the particulars of the oral land purchase agreement alleged by the appellant are not recorded in the proceedings. For that reason, he said, what remains in record as exhibits is a letter from Isseke Village dated 24/11/2011 which bears the stamp of the Village Executive Officer (VEO) and signed by other witnesses and the letter from the trial Tribunal dated 4/8/2018 which was stamped by VEO wherein the appellant promised to yield vacant possession to the respondent by 30/7/2019. It was Mr. Wasonga's argument that the said letter where the appellant is commiting to vacate on 30/7/2019 was never disputed by the appellant during trial.

Mr. Wasonga submitted further that under section 100 of Evidence Act, [Cap 6 R.E 2019] oral evidence cannot stand where there is written evidence. He reckoned that there were decisions of the Court of Appeal to that effect, which however he could not immediately cite.

Submitting as an alternative, Mr. Wasonga argued that in the event the appellant insists there was adverse possession, the respondent's side shall seek to apply the case of **Maigu E.M Magenda V. Arbogast Mango Magenda**, Civil Appeal No. 218 of 2017, CAT, Mwanza since the evidence on record shows that the appellant was an invitee to the land in dispute. He said, the cited case provides for the status of an invitee vis a vis the law of limitation.

Mr. Wasonga submitted that the adverse occupation of the land in dispute by the appellant won't be a bar to the respondent's ownership of the same. He cited the case of **Mkemalila and Thadeo V. Wilenda** (1972) H.C.D 4, where it was held that an invitee cannot assume ownership to exclude the owner. He added that the appellant's status was also questionable for lack of letters of administration appointing her as the administratrix of husband's estate. Having so submitted, Mr. Wasonga prayed that the to be appeal be dismissed with costs.

In her rejoinder, Ms. Ahmed reiterate her submission in chief that the source of the despite is double sale of the suit land to the respondent. On details of the oral land purchase agreement, she said that the appellant did tell the trial tribunal that she bought the land in dispute at a consideration of Shillings Thirty Thousand (Tsh. 30,000/=) paid to Yacobo Chiyanga and her wife, each receiving Shillings Fifteen Thousand only (Tsh. 15,000/=). She added that the appellant was able to identify her boundaries as well.

She also rejoined that the appellant was not an invitee as her husband and herself bought the suit land as per evidence adduced during trial.

On the agreement dated 4/8/2018 which bears stamp of Isseke Village Executive Officer and not of the Ward Council, she said the agreement was rendered illegal for bearing a stamp of a different office. That, the agreement was made at the Village Land Council according to the proceedings. Thus, the irregularity rendered the said agreement unlawful.

On the cited case of **Maigu E.M Magenda V. Arbogast Mango Magenda (supra)** the learned appellant's advocate sought to distinguish it saying it has not discussed the issue of adverse possession.

Ms. Ahmed insisted that the appellant has been living peacefully on the land for over 12 years until when the child of Mr. Yacobo Chiyanga sold the land to another person. Hence, the lawful owner of the land in dispute is the appellant and not the respondent who bought it from people who have no letters of administration in respect of the state of the late Yacobo Chiyanga.

On the question that the respondent was an invitee as a girl friend of Mwaja, she said that there is no proof especially where there is no dispute that the respondent bought the land while the appellant had already erected a house on it. She added that the principle of buyer beware was not observed by the respondent. She argued further that in supposition of the appellant being an invitee, she should be compensated for unexhaustive improvement on the land.

After the recorded rival submissions, the parties made cross-prayers to the court. While the appellant prayed the Court to allow the appeal, the respondent prayed the appeal to be dismissed with costs.

Having heard the submissions by the learned advocates and after reading proceedings and judgment of the lower tribunals, the major issue for my determination is whether the appeal is meritorious. I should state in the outset that the testimonies by both sides left much to be desired. Neither of the party adduced water tight evidence. For this reason, the lower Tribunals did and this court shall decide this matter from what is available on record.

As I have stated in the opening sentence of this judgment, this is the second appeal. Both the trial Ward Tribunal and the Manyoni DLHT made a concurrent finding that the land in dispute belongs to the respondent, having proved his ownership to the required standard against the weak evidence of adduced by the appellant. With such a concurrent finding, this Court is guided to exercise extreme restraint in interfering with the decision made by the lower tribunals. The court at this level has to consider if the lower tribunals in reaching their decision had committed any misdirections or non-direction on the evidence and the law. (See **DPP V. Jaffari Mfaume Kawawa** (1981) TLR 149, a Court of Appeal decision).

I have reviewed the judgment and proceedings of the lower tribunals in light of the fronted grounds of appeal. In the second ground of appeal

appellant had been on the suit land since 1998 when she bought it jointly with her deceased husband.

Mr. wasonga for the respondent challenged this assertion by saying that being an adverse possessor and a buyer at the same time is something that cannot be comprehended. I agree with him. The appellant can either be buyer or a trespasser who has had uninterrupted enjoyment of the suit land. she cannot be both. Unfortunately, she could not furnish any convincing evidence prove either of the status. To the contrary the evidence adduced in trial by DW1 the respondent, DW2 Gelvas Mwaja, DW3 Anthon Daudi and DW4 John Andrea was to the effect that the land belonged to the respondent and the appellant was made aware of the fact during winding up of the funeral for her husband. This testimony, coupled with the agreement signed by the appellant that she is not the owner of the land in dispute and that she would yield vacant possession to the respondent on 30/7/2019 was enough, in the circumstances of this case, for the trail Tribunal, to hold the respondent as the owner.

There was an invitation by Ms. Ahmed to belittle the weight of evidence given to the said agreement dated 4/8/2018. With respect, I don't agree with her. This document is very simple and clear on its contents. It is written in simple Swahili language which the appellant appeared to understand. The appellant signed by the name of Asha Mwaja. She has not objected the name of Asha Mwaja to be her name and neither did she dispute the content therein.

As regard the stamp confusion, it appears to me that the stamp of the Village Executive Officer appearing at the top left conner of the cited agreement dated 4/8/2018 is for acknowledging receipt of the copy of the document. It appears that the same was received on 6/08/2018 having been signed on 4/8/2018. There is neither confusion nor illegality with regard to this document. Therefore, on balance of probabilities, it is the respondent who was able to prove his case.

In holding as above, the Court has actually disposed of the appeal in its entirety as the second ground of appeal is about evidence adduced by the appellant, which was said to be watertight. I have already held that it was not.

However, before winding up my deliberations, for purposes of setting records clear, I would like to comment on the judgment of Manyoni DLHT which upheld the trial Tribunal's decision. There is no mention of assessors and their opinion in the entire three-page judgment. The proceedings show that the Chairman was sitting with the assessors. But their opinions were not recorded therein.

The law is more than settled under regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002 that the Chairman of the Tribunal before making his judgment has to consider the opinion of the assessors. This mandatory requirement of the law was not observed. As the omission is fatal, I have no other alternative but to invoke revisionary powers of this Court under the Land Disputes Courts Act, [Cap 216 R.E 2019] to quash the decision of the Manyoni DLHT

for that serious irregularity. Having done so, what remains is the decision of the trial Tribunal, which is the decision of this Court as well.

Having found no merit in the appeal, I hereby dismiss it. However, having considered that in the appellant is a widow, I make no order as to costs.

Ordered accordingly.

Dated at **Dodoma** this **23rd day of June, 2022**

ABDI S. KAGOMBA

JUDGE