IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND CASE APPEAL NO. 29 OF 2022

(Originating from Land Application No. 49/2017 of the District Land and Housing Tribunal for Kagera at Karagwe)

ALIBINUS ALUBERT.....APPELLANT

VERSUS

CLEVINA THEOPHIL BATANGA.....RESPONDENT

JUDGMENT

12th September & 23rd September 2022

Kilekamajenga, J.

The record in this case shows that, the appellant was allocated nine acres of the land by Kishojo village on 21st June 2004. Since then, the appellant developed the land by planting eucalyptus trees and partly used it for agricultural purposes. Sometimes in 2017, the respondent rose-up claiming ownership of the land alleging that the same was given to her by her father, Theophilo Baitanga vide a letter dated 10th February 2002. The respondent went further filing a case against the appellant in the District Land and Housing Tribunal for Kagera at Karagwe seeking to be declared the lawful owner of the disputed land. She alleged that, the value of the land in dispute is Tshs. 35,000,000/=. According to the application filed in the trial tribunal, the land in dispute is located at Kakiro village within Karagwe District.

During the trial of the case, the respondent (PW1) testified that, her father who died in 2006 bought the land in 1952 from traditional leaders and the same was given to her in 2002. The respondent's father was given the purchase receipt though it was lost after her father married another wife. She further stated that, the appellant encroached into her land by 58 times 192 footsteps. PW2 (Willbard Rwenduru) supported the respondent's testimony stating that the respondent's father bought the land in 1952 and the boundaries were fixed in 1954. By that time, PW2 alleged to have been in standard five. However, PW2 refuted the allegation that the respondent's father got a receipt after the purchase of the land in dispute. PW3 (Justin Mtabazi) simply stated that the appellant trespassed into the respondent's land. PW4 (Athanazi Kishaija) testified that, him together with the respondent's father were allocated land by Ruyanga Village Council in 1952. He named the Village Executive Officer to be Omukungu who gave them the land.

On his side, the appellant (DW1) stated that, he was allocated the land by Kishojo Village Council in 2004 after the government instructed village authorities to allocate bare lands to villagers to plant trees so as to protect environment. The appellant was among the twenty seven (27) villagers who applied for such bare land and he was given nine acres on 24th June 2004. He paid for the land

allocation and given a receipt and continued to develop it. He further testified that, the family of the respondent also have a piece of land next to his land. DW2 (Laulian Fulgence Petro) confirmed that the appellant was allocated nine acres by Kishojo Village Council. DW2, being a member of the land use committee in the village, participated in the land allocation process in 2004. He was actually puzzled to hear that the respondent complained against the appellant. DW3 (Filbert Albert) was the hamlet chairman and also a member of Village Council from 1995 to 2020. He confirmed that the appellant was allocated nine acres in 2004 and developed it by planting trees until in 2017 when the dispute arose. DW4 (Khamis Kaihura) who knew both the appellant and respondent stated that, the respondent lives in Kakiro village whereas the land in dispute is located in Kishojo village. He further testified that, when the appellant was allocated the land in 2004, he developed it and there was a time when the appellant sold part of the land to Nassoro. He further confirmed that the suit land belonged to Kishojo village before being allocated to the appellant.

At the conclusion of the trial, the trial tribunal decided in favour of the respondent something that prompted the appellant to file the instant appeal. He coined eight grounds to impugn the decision of the trial tribunal thus:

1. *That, the trial tribunal erred in law and facts not to consider that, the suit premise was time barred. That the appellant have occupied the suit premise for more than 13 years undisturbed.*

2. *That, the trial tribunal erred in law and fact to decide on favour of the respondent basing on the age of the witness and not the evidence of witnesses thus unjust on part of the appellant.*
3. *That, the trial tribunal erred in law and fact for failure to find that, the tendered exhibit by the respondent to prove title over the suit premise, was irregular, and fatal in the eyes of the law for lack of signature of the one purported to pass title and one passed title over the suit premise. Further the purported transaction lacks the blessing of the village authority, thus void in the eyes of the law.*
4. *That, the trial tribunal erred in law and fact to determine the dispute grounding on the shaking and unreliable evidence produced before the trial tribunal, that on its face did not establish the root of the title to the respondent.*
5. *That, the trial tribunal erred in law and fact for not considering the respondent did not show how his father got the suit premise by producing the relevant documents to prove title over the same.*
6. *That, the trial tribunal erred in law and fact for not considering the evidence adduced by the appellant, thus unjust on part of the appellant.*
7. *That, the trial tribunal erred in law and fact to decide on favour (sic) of the respondent despite clear and crystal adduced testimony including the exhibit 'D1' tendered by the appellant in respect of the allocation and ownership of the suit land by the Kishogo village council with definite size of 9 acres. The trial tribunal immensely misdirected itself to hold that, the appellant had encroached into the same property.*
8. *That, the trial tribunal proceedings are tainted with illegalities.*

The hearing of the appeal brought the attendance of the appellant and his counsel, Mr. Ibrahim Mswadick and the respondent and her advocate, Mr. Evans Kaiza. The counsel for the appellant addressed the court on the grounds of appeal. On the first ground, Mr. Mswadick informed the court that, the appellant was allocated the land in 2004 and continued to use it since then. Therefore, the appellant has been occupying the land in dispute for over thirteen (13) years without any disturbance. When the respondent filed the instant case in 2017, the time allowed to claim for the land, which is twelve years, had expired because the cause of action arose in 2004. The counsel referred the court to the case of **Yusuph Same and Another v. Hadija Yusufu** [1996] TLR 347 and **section 3(1) of the Law of Limitation Act, Cap. 89 RE 2019**. He argued further that, the issue of time limitation may be raised at any stage of the case.

On the second ground, the counsel assailed the decision of the trial tribunal for basing on the age of the witnesses instead of considering the value of the evidence adduced. On the 3rd, 4th and 5th ground, Mr. Muswadick challenged the documentary evidence relied on by the respondent to claim ownership. The alleged letter that gave ownership of the land to the respondent does not bear the signature of the respondent nor that of the donor. Such documentary evidence is questionable. He invited the court to the decision of **Prucheria John v. Wilbard Wilson and Another**, Land Case Appeal No. 64 of 2019. The

counsel further hinted on the contradiction apparent on the respondent's evidence. He cited an example that, while the respondent alleged her father to have purchased the land received a receipt, PW2 denied that allegation of getting the receipt after the purchase of the land. On the sixth ground, the counsel insisted that the appellant was allocated nine acres of bare land and the boundaries were clearly fixed. The appellant's evidence further shows that the village owned the land before allocating it to the appellant. According to principle of the law laid in the case of **Hemed Said v. Mohamed Mbilu** [1984] TLR 113, a party with heavier evidence has the right to win the case. On the seventh ground, the counsel informed the court on the existence of two contradicting orders of the trial tribunal. At the 6th page of the typed proceedings, the trial tribunal ordered the case to proceed in absence of the appellant but such an order was later vacated without a proper ruling.

In response, the counsel for the respondent stressed that, the trial chairman's wisdom dictated the matter to be heard inter-parties. On the issue of time limit, Mr. Kaiza cited **section 5 of the Law of Limitation Act** insisting that, the cause of action accrued in 2017 when the appellant encroached into the respondent's land. On the second to the seventh ground, the counsel stated that the evidence was sufficient to allow the trial tribunal decide in favour of the respondent. The respondent's witnesses were conversant with the land in

dispute and the parties own land next to each other. It is not clear whether the respondent was involved when the village allocated the land to the appellant. On the point of authenticity of the documentary evidence tendered by the respondent, Mr. Kaiza was of the view that, it was a new issue which was not addressed by the trial tribunal though the same exhibit was admitted without objection from the appellant. He urged the court to dismiss the appeal and uphold the decision of the trial tribunal.

The rejoinder from Mr. Muswadick stressed that, the appellant occupied the land since 2004, the respondent ought to claim it in 2016 and not otherwise. He further insisted that, the trial chairman erred in not considering the heavier evidence of the appellant. He finally reiterated the prayer to allow the appeal.

This court is called upon to determine this appeal based on the grounds advanced by the appellant. In this case, the appellant raised eight grounds to challenge the decision of the trial tribunal. However, upon reading the grounds of appeal and considering the arguments advanced by the learned advocates for the parties, there are two points that this court wishes to address. **First**, the counsel for the appellant raised an issue on the contradiction in the respondent's evidence. The counsel for the respondent on the other hand, refuted that allegation while insisting that the respondent's evidence was heavier than that of the appellant.

Under the law, a civil case is always decided based on the balance of probability. See, **section 3(2)(b) of the Evidence Act, Cap. 6 RE 2019**. It is also a settled principle of the law that, both sides of the case cannot tally as there must be a party with heavier evidence than the other. A party with heavier evidence must win the case. In the case of **Hemedi Saidi** (*supra*) the Court stated that:

> *"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

Based on the above principle of the law and this being the first appellate court, I was prompted to revisit the evidence adduced during the trial and found the following: The respondent (PW1) testified that, the land is dispute was purchased by her father in 1952 from traditional leaders and a receipt was given, though the same receipt got lost when her father married another wife. However, PW2, who also alleged to be present at the time the respondent's father purchased the land, refuted the allegation that there was a receipt given. Furthermore, PW3 testified that, him together with the respondent's father were allocated the land by the village in 1952. In other words, PW3 refuted the assertion that the respondent's father bought the land, instead the land was allocated to him by the village. Further investigation of the evidence reveals that, when PW3 was testifying before the trial tribunal in 2021, he was 84 years old. By a simple calculation of the age, PW3 was just fifteen years when he was

allocated the land by the village together with the respondent's father. PW3 went further stating that, the Village Executive Officer at that time was Omukungu. Again, PW3 seems to be lying because the office of the Village Executive Officer was yet to be established in 1952. Moreover, the application filed by the respondent shows that the land in dispute is valued at Tshs. 35,000,000/=. However, in her own oral evidence, the respondent stated that, the appellant encroached into her land the size of 58 times 192 footsteps. Though I am not a land valuer, it is hard to believe whether such a small size of the land at Kikiro village in Karagwe District may have such a huge value. These doubtful information shade doubts on whether the respondent's evidence is credible. I find this contradiction affected the respondent's evidence and that of her other witnesses. I find the respondent's case weak or rather vexatious.

On his side, the appellant consistently stated that, he was allocated the land after the government instructed villages to allocate bare land for villagers to plant trees for environmental reasons. He applied to be allocated the land together with other twenty seven villagers and he paid Tshs. 10,000/= for each acre. His testimony was supported with the erstwhile member of the land use committee (DW2). DW3 who was the hamlet chairman in 2004 confirmed that the land was allocated to the appellant. DW4 nailed further that, the respondent lives in Kakiro village while the appellant lives in Kishojo village. These are two

neighbouring villages. When the village allocated the land to the appellant, the appellant even sold part of the land to Nassoro and the respondent, who was around, never complained. Based on this evidence, I have no hesitation to conclude that, the appellant's evidence is so coherent on where and when he got the land. I am convinced that, the appellant's evidence is heavier than that of the respondent.

Second, the counsel for the appellant vehemently argued that, the suit was time barred as the appellant has been using the suit land for over twelve years. On the other hand, the counsel for the respondent argued that, the cause of action arose in 2017 when the appellant encroached into the land. The careful perusal of the record and evidence adduced during the trial, clearly shows that, while the respondent lives at Kakiro village, the appellant lives at Kishojo village. The land in dispute is at the border between these two villages. There is further stronger evidence suggesting that the appellant has been using the land ever since he was allocated in 2004. The respondent, who just lives in the next village, could not have failed to discern that, the appellant planted trees and even sold part of the land to Nassoro. It clearly suggests that, the respondent formed an afterthought to claim the land from the appellant. In terms of **section 3 (1) of the Law of Limitation Act, Cap. 89, RE 2019**, read together with Part I item 22 of the schedule of the same Act. The case before the trial tribunal was

incompetent for the good reason that it was brought after the period of 12 years. The time accrued in 2004 when the appellant was allocated the land and started developing it. This is a point of law which may be raised at any stage as it was stated in the case of **B.9532 CPL Edward Malima v. the Republic, Criminal Appeal No. 15 of 1989**, CAT at Mwanza (unreported) thus:

> *'...we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of parties.'*

Even by the application of the doctrine of adverse possession, the respondent had no right to claim ownership of the land which the appellant has occupied without interruptions for thirteen years. This principle of the law was stated in the case of **Bhoke Kitang'ita v. Makuru Mahemba, Civil Appeal No. 222 of 2017 CAT at Mwanza (unreported),** where the Court of Appeal of Tanzania stated that:

> *"It is a settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise hi right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession."*

In the above case, the Court of Appeal adopted the approach and stance of law developed in a number of cases including the cases of **Moses v. Lovegrove [1952] 2 QB 533** and **Hughes v. Griffin [1969] 1 All E R 460**, where it was stated that:

> *"[ON] the whole, a person seeking to acquire title to the land by adverse possession had to cumulatively prove the following:*
>
> *a) That there had been absence of possession by the true owner through abandonment*
> *b) That the adverse possessor had been in actual possession of the piece of land;*
> *c) That the adverse possessor had no colour of right to be there other than his entry and occupation*
> *d) That the adverse possessor openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
> *e) That there was a sufficient animus to dispossess and an animo possidendi*
> *f) That the statutory period, in this case* ***twelve (12) years, had elapsed;***
> *g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*
> *h) That the nature of the property was such that in the light of the foregoing/adverse possession would result.*

In conclusion, the evidence adduced before the trial tribunal gives a higher probability that, the appellant was allocated the land in 2004 and he has been using the same for thirteen years until the respondent filed the instant case in

2017. The respondent's evidence is too weak to support the allegation that her father acquired it in 1952 and the same was given to her in 2002. Also, under the doctrine of adverse possession, the respondent who has been living in the next village and also has a piece of land next to the appellant cannot, after thirteen years, claim ownership over the land in dispute. I find merit in the appeal and hereby allow it with costs. I set aside the decision of the trial tribunal and declare the appellant the lawful owner of the land in dispute. I further order the respondent to vacate from the suit land as soon as practicable. It is so ordered.

DATED at **BUKOBA** this 23rd day of September, 2022.

Ntemi N. Kilekamajenga.
JUDGE
23/09/2022

Court:

Judgment delivered this 23rd September 2022 in the presence of the appellant and his counsel, Mr. Ibrahim Mswadick. The respondent and her counsel, Mr. Evans Kaiza were present. Right of appeal explained to the parties.

THE HIGH COURT OF TANZANIA
BUKOBA

Ntemi N. Kilekamajenga.
JUDGE
23/09/2022