IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 122 OF 2021

(Originating from Land Application No 05 of 2019 of the district Land and Housing Tribunal for Tarime at Tarime)

GESERO CHACHA KENG'WENA ..... APPELLANT

VERSUS

SARAH CHACHA OBOGO .....1ST RESPONDENT

CHACHA CHACHA OBOGO ..... 2ND RESPONDENT

GHATI CHACHA OBOGO ..... 3RD RESPONDENT

JUDGEMENT

4th August & 30th September, 2022

F. H. Mahimbali, J.

The contest of this dispute on landed property concerns ownership of land. Whereas the appellant claims ownership of it since 1958 as was first used by his father. To his surprise, in 2016 the respondents unlawfully intervened/trespassed into the suit land allegedly belonging to him. Upon involving the local leaders of the area but in vain, the suit was then referred to the DLHT whose decision displeased the appellant. Thus, the basis of this appeal on the following grounds:

1. *That, the trial tribunal erred in both law and fact for failure to consider the long occupation of the suit land by the appellant that is since 1958.*

2. *That, the Hon trial tribunal erred in law for the failure to notice that the appellant averment that he got the suit land from inheritance from his late father while the first respondent together with other respondents did not state how they come into or they acquired the disputed land.*

3. *That, the trial tribunal held basing on the fact that there was conflict between the parties in 2004 without providing any documentary evidence such as number of the case and parties to conflict at the Ward tribunal as they said were advised.*

4. *That, Hon trial tribunal erred in both laws and fact for basing on the evidence of village chairman and Hamlet chairman who was in power in 2015 while according to them the disputed arose in 2014 before they came to power.*

5. *That, the hon trial tribunal erred in law and fact for the failure to determine that the appellant was born in 1958 in and lived while developing the same since then until to date and he never vacated the suit land for whatsoever.*

During the hearing of the appeal, Mr. Mligo learned advocate while being assisted by Ms Maura Tweve, learned advocate appeared for the appellant whereas the 1st and 3rd respondents appeared in person and unrepresented. In respect of the second respondent, the appeal proceeded exparte against him upon proof of service.

Before arguing the appeal, Mr. Ostack Mligo first prayed to add one ground of appeal "that the trial tribunal visited the locus in quo in the absence of the appellant and thus was prejudiced with the right of being fully heard".

In arguing the said appeal, Mr. Mligo argued the 1st, 2nd and 5th grounds together and also the 3rd, 4th and 6th grounds also were argued together.

With the 1st, 2nd and 5th grounds of appeal, his main concern is, there is ample evidence by the appellant at the trial tribunal than that of the respondents, yet the trial tribunal disregarded it. He submitted that the appellant testified how he got that land from his father since 1958 and that he has been using that land from then, to date, (relying on pages 10 and 11 of the typed proceedings). His testimony is collaborated by the evidence of PW2 who was once ward counsellor and a member in land committee that he knows the appellant since then (see page 11 and 12 of the typed proceedings). He also had a neighbour (PW3) who testified how he knew the appellant and his deceased father in relation to the ownership of the disputed land.

On this, he contended that the trial tribunal didn't accord any weight of that evidence. As he has been in that land since 1958 and that

he was never treated a trespasser, his evidence is superior to that of the respondents. Persuading this Court via the decision by the Court of Appeal in the case of **Bhoke Kitang'ita vs Makuru Mahemba,** Civil Appeal No 222 of 2017 at page 7 and 8, ruled clearly that a person with long possession is entitled to possession by adverse possession. Only a party with stronger evidence must be declared a winner as per the decision in the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR 113, persuaded Mr. Mligo for the appellant.

With the second limb of the grounds of appeal, he argued that the trial court had erred to grant ownership to the respondents against the appellant. Since their evidence is weaker, they were not entitled to it. He criticised that SU1 didn't testify on how he acquired the said land. There is no any exhibit for that assertion. Considering the testimony of DW1 and DW2, they were only neighbours, he treated the respondents' testimony as weaker and of no evidential value and self-contradicting. On contradictory evidence, he referred this Court to the case of **Awadhi Abiahamu Waziri vs Republic,** Criminal Appeal No 303 of 2014, where such evidence is disvalued.

Further, he challenged the chairperson's move of visiting the locus in quo in the absence of the appellant. Considering that the DLHT on

8/10/2020 issued directives that the visit to the locus in quo will be on 23/12/2020, to the contrary, the respondent and the trial tribunal visited the locus in quo on 16/9/2020 in the absence of the appellant. Since the trial tribunal visited the locus in the absence of the appellant, he was prejudiced. He ought to be heard. In the case of **Sabasabaenosi vs Republic,** in Criminal Appeal NO 135 of 2015, at page 12 is clear:

> *When the rights and duties of any person are being determined by the court or any agency, that person shall be entitled to a full hearing.*

Since there were other members at the scene and the trial court proceeded to determine the merits of the case without according the right to be heard of the appellant, he considered trial DLHT was then biased to the appellant.

The 3rd Respondent on his part resisted the appeal arguing that the respondents had stronger and more convincing evidence than the appellant's case. On this, he is of the firm view that the trial DLHT rightly ruled the case.

As regards to the visit to the locus in quo, he shifted burden to the appellant as the one who was avoiding going site. He kept on avoiding visiting the locus in quo now and then. He insisted that the appellant is just a trespasser to that land.

The 1st Respondent on her part, contended that the appellant is a mere trespasser to the land in dispute. He built it at night, why? That herself was married there in 1984 and lived in the suit land all that time todate. She querried, if the said land belongs to the appellant, where had he been all that time?

In a brief rejoinder submission, Ms Maura Tweve insisted that the date of visit to the locus in quo was changed without due communication to the appellant.

Further, she submitted that considering the age of the respondents, she wondered if they could testify for issues of 1974. She prayed that the appeal be allowed with costs.

I have dispassionately digested the submissions of the parties and or their advocates in this appeal. I have equally gone through the trial tribunal's records in respect of this appeal. The vital question is one, who is the rightful owner of the suit land? The appellant or the respondents.

According to the evidence/facts of the case, it appears that the appellant and the respondents were neighbours. Both parties seem not to be original owners of the suit land. The appellant claims inheriting the

suit land from his deceased father, whereas the 1st respondent claims ownership of the said land as she was married to her deceased husband in 1984 and lived together with her husband in that land until his demise in 2007. She claims to have automatically assumed possession of it after the demise of her husband. The third respondent is the son of the deceased father. So, as he was living in the same compound, he was jointly sued with the 1st respondent.

According to the trial tribunal record, on the evidence of the appellant as to why he claims ownership of that land, he testified:

> *"I am the owner of the disputed land. I inherited it from my father. I used it up to date. I have no other land, apart from that."*

When cross examined by the 1st Respondent as to when he started living in the disputed land, he replied in 1983. As to whether he had any letters of administration, he had none. When asked by the 3rd respondent the same question, he replied that he started living in the disputed land in 1958 up to date. From this evidence it is not clear whether the same land owned by his father is the same land he is claiming against the respondents. Equally, there is no evidence that his father owned the said land visa viz the 1st respondent's husband. All this considered, neither there is evidence from the appellant whether he

inherited the said land from his father or administered the said estate. The only evidence that can connect him with ownership of land is that of PW3. Nevertheless, it is not clear whether the land PW3 is describing in his testimony is the same land the appellant pleaded in his application. The same is quoted:

> *"I know the land in dispute. My father lived there before 1958. Applicant's father started to live in Nyamagongwi hamlet in 1958. He lived there up to Operation Vijiji.* ***They moved to Masanga*** *Village which is near to the disputed land. In south east our boundaries with the applicant father's land we planted sisals. In east, they were bordered by Ngonje Hamlet. In North there was Paul Chacha Matokole and Matatiro Muniko Kibiti @ Nchororo. In front there is Nyamagongwe mountain..... The applicant* ***is still using the land in dispute up to date****. The land in dispute is at Nyamagongwe hamlet. ....." [emphasis added]*

As per application commencing the suit case at the trial tribunal, the location of the suit land is stated as follows: *"The suit land between the parties is at Tarime District of Mara".*

The importance of making detailed descriptions of suit lands in resolving land disputes cannot be emphasized. The law has been consistently underscoring that significance (**Order VI, rule 3 of Cap 33**

R. E. 2019). It guides that in claims for immovable properties, the plaint shall disclose:

> *"a description of the property sufficient to identify it and in case such property can be identified by the number under the Land Registration Act the plaint shall specify such title number".*

It is equally my settled opinion that Regulation No 3 (2) (b) of the GN 174 of 2003 (supra) should be construed to mean what was envisaged under these provisions of **Order VI, rule 3** Cap 33. Though the appellant claims against the respondents for land in dispute as his, it is not in tallying in description with land he claims in his application. This is because there is no nexus evidence linking the suit land as per PW3's evidence and land the in the application to mean the same land. After all, PW3 claims that Applicant's father started to **live in Nyamagongwi hamlet in 1958.** He lived there up to Operation Vijiji. **They moved to Masanga Village** which is near to the disputed land. This then brings confusion as to which land now is the land in dispute by the appellant. is it that of Masanga Village or that of Nyamagongwi?

In the case of **Daniel Kanunda** (As Administrator of the Estate of the late **Mbalu Kashaha Buluda Vs Masaka Ibeho and 4 others**,

Land Appeal No 20 of 2015, High court Tabora, Utamwa, J at page 7 made insistence of description of the Suitland in the following wording.

> *"... land in fact a natural immovable solid part of the earth or its surface (and some of its contents) extending globally with some various manmade division, sub division manmade divisions, sub divisions, sub-sub divisions etc. Such as continents, states, countries, Regions, District villages etc. For purposes of ownership or possession of land, it is specific demarcations and the location (geographical, Political or otherwise) of a piece of land that differentiates it from another piece of the same earth or its surface. Admittedly this may not be the very professional way of describing land, but at least these are the practical and common attributes exemplifying land, I am entitled to presume them as true under section 122 of the Evidence Act (Cap 6 R. E. 2019). It is for this truth I believe my brother (Moshi, J as he then was) remarked to the effect that land can only be allocated when distinct and determinable .... It is also common knowledge that villages in this country represent sub-partitions of land and are creatures of law properly registered (section 22 of Cap 287) they are found in larger political partitions within the country such as wards, Districts and Regions".*

With this evidence of the appellant, it is not clear which and where, is the suit land for this dispute.

The next question for digest is the appellant's grievance on the issue of visit to the locus in quo. On this, Mr. Mligo argued that

as per trial tribunal record, the DLHT on 8/10/2020 set the date of visit to the locus would be on 23/12/2020. To the contrary, the respondent and the trial tribunal visited the locus in quo on 16/9/2020 in the absence of the appellant. Since the trial tribunal visited the locus in the absence of the appellant, Mr. Mligo submitted that the appellant was prejudiced. He ought to be heard. He stressed his point making reference the case of **Sabasabaenosi vs Republic,** in Criminal Appeal NO 135 of 2015, at page 12.

My quick and thorough perusal to the trial tribunal's records dated 16th July 2020, establish the appellant's case was closed; and ordered defense case on 8th October, 2020. The records establish that on 8th October, 2020 the defense case was heard and subsequently fixed for visit to the locus in quo on 23rd December, 2020. Astonishingly, the trial tribunal record establishes that visit to the locus in quo was not done the set date of 23rd December, 2020 but on 16th September, 2021 and judgment on 5th November, 2021. The argument by Mr. Mligo that it was rescheduled without notice to them has been countered by the respondents submitting that the appellant had been evading the visit to the locus in quo

until when the trial chairperson decided to do it in his absence. The arguments by the respondents would make sense, but is not supported by the tribunal record. However, it is clear that the said visit was not earlier rescheduled to 16/9/2020 but postponed to 16/9/2021 (Almost a year later) and not three months before.

In the case of **Avit Thadeus Massawe Vs. Isidory Assenga**, Civil Appeal 6 of 2017, Court of Appeal at Arusha, insisted on the essence of a visit to a locus in quo while making reference in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others,** Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the *locus in quo*. The factors include:

1. *Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see Othiniel Sheke V Victor Plankshak (2008) NSCQR Vol. 35, p. 56.*
2. *The essence of a visit to locus in quo in land matters includes* ***location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the***

land *(see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p.263.*

3. *In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see Ezemonye Okwara Vs. dominic Okwara (1997) 11 NWLR (Pt. 527) p. 1601).*
4. *The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. (Emphasis added).*

A visit to locus in quo definitely helps the courts determine the case with clarity and certainty. However, it is important to note that the practice of visiting a locus in quo is not novel in our jurisdiction (The Court, in the case of **Nizar M. H. Vs. Gulamali Fazal Janmohamed** [1980] TLR 29, faced a scenario whereby the trial magistrate visited the locus in quo and the judge sitting on appeal also did so). The Court was of the view that such visit should be done only in exceptional circumstances by the trial court to ascertain the state, size, location and so on of the premises in question.

Clarifying on the point, the Court stated

> *"It is only in exceptional circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator.*

"When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by the witnesses. We trust that this procedure will be adopted by the courts in future."

In the case at hand, though the coram of 30th September, 2021 does not indicate the appellant being present, but he appears to have featured in the proceedings and stated the following:

"Kwenye nyumba ya bati ya mjibu maombi wa kwanza ndipo yalipokuwa makazi yangu ya awali na ndipo nilipozaliwa na pale kuna kaburi la ndugu ya aliyefariki mwaka 1960 aitwaye Munge Chacha" (page 30 of the typed proceedings)

In totality, I find there was no any prejudice occasioned to any party in this case as per nature of the proceedings. The argument that there was no appellant in attendance, the proceedings don't support it as stated above. This suggests that, the trial chairperson just skipped

recording his attendance but made active participation at the locus in quo. What I want to emphasize here are two things: firstly, the visit to the locus in quo is not necessary where there are no reasons for ascertaining at the said premises. It only becomes necessary if there is something for clarity and certainty. In this case though the said clarity and certainty was not first introduced for that establishment, yet the trial tribunal felt it important to make a visit. Secondly, what was gathered at the locus in quo established that the appellant had already abandoned the suit premises for a long time when he was recorded saying: *"Kwenye nyumba ya bati ya mjibu maombi wa kwanza ndipo* ***yalipokuwa makazi yangu ya awali*** *na ndipo nilipozaliwa* ***na pale kuna kaburi la ndugu ya aliyefariki mwaka 1960 aitwaye Munge Chacha."***

A place that was once used by your ancestors or parents or grand parents should not necessarily mean remaining yours if there has been no active use for a considerable moment of time. Since the appellant's evidence is so skimpy and of no value, I find it not establishing anything in respect of continuing use of the said land as alleged from 1958. The only evidence that at least established his far connection with the land is that of PW3. However, PW3 could not establish ownership to the appellant in the absence of the evidence of the claimant himself establishing how he got the said land. The law is, no one can testify on

behalf of another **(NATIONAL AGRICULTURAL AND FOOD CORPORATION v MULBADAW VILLAGE COUNCIL AND OTHERS** 1985 TLR 88 (CA)). The evidence of PW3 could have been relevant and valuable had the appellant first testified so or closely to that meaning. So, there is no corroboration but different evidence by the PW3 and not similar to that of PW1 (the appellant).

In any sense, what can be gathered from the testimony of PW3 suggesting that the suit land was once occupied by the father of the appellant (in 1958) but shifted the premises during the operation Vijiji, there is no evidence as to when his parents returned to that land. So, by when the respondents occupying that land from 1970s in the absence of disturbance from the appellant until 2014, he is barred by law of limitation on the principle of adverse possession (**Registered Trustees of Holly Spirit Sisters Tanzania vs January Kamili Shayo, & Others** (Civil Appeal 193 of 2016) [2018] TZCA 365) where the Court of Appeal drew inference from the Kenyan case **of Mbira v Gachuhi** [2002] 1 EA 137 (HCK) wherein it was held:

> *- "The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises; if the occupier's right to occupation was derived from the owner in the form of permission or agreement, it was not adverse"*

In the foregoing remark, the High Court of Kenya had referred and followed two English decisions - viz - **Moses v Lovegrove** [1952] 2 QB 533; and **Hughes v Griffin** [1969] 1 All ER 460. In those cases, it was held that it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Thus, on the whole, a person seeking to acquire title to 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 color of right to be there other than his entry and occupation;

d) That the adverse possessor had 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;

e) That the statutory period, in this case twelve years, had elapsed;

f) That there had been no interruption to the adverse possession throughout the afore said statutory period; and

g) That the nature of the property was such that, in the tight of the foregoing, adverse possession would result.

With this case at hand, if the appellant at all owned that land from 1958, he might have somewhere abandoned it. Therefore, the subsequent use of the said land by the respondents from 1970s and in 1984 in particular by the first respondent (spouse), I find this appeal being bankrupt of any merit, and stands dismissed with cots.

DATED at MUSOMA this 30th day of September, 2022.

F.H. Mahimbali

JUDGE

Court: Ruling delivered 30th day of September, 2022 in the presence of Respondents, Mr. Ostack Mligo, advocate for the appellant and Mr. Gidion Mugoa, RMA.

Right of appeal explained.

F. H. Mahimbali

JUDGE