IN THE HIGH COURT OF THE NITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 32 OF 2022

(Arising from the judgment of the District Land and Housing Tribunal of Tarime at Tarime Land Application No 91 of 2018)

SAMWEL OCHIENG ONDOTO ..... 1ST APPELLANT

KWARA AIRO ..... 2ND APPELLANT

VERSUS

FROLA AUMA NYARONGA ..... 1ST RESPONDENT

(Pronate Administratrix of the Estate of

The late GERSHOM OLIVER NYARONGA

MONICA APIYO NYARONGA .....2ND RESPONDENT

(Pronate Administratrix of the Estate of

The late GERSHOM OLIVER NYARONGA

JANE AKINYI NYARONGA .....3RD RESPONDENT

(Pronate Administratrix of the Estate of

The late GERSHOM OLIVER NYARONGA

JUDGEMENT

24th August & 30th September, 2022

F. H. Mahimbali, J.

The appellants in this appeal were respondents at the trial tribunal in which they lost the suit filed by the respondents. They are aggrieved by the said decision thus the basis of this appeal.

The brief facts of the case can be summarized this way. The respondents who are administrators of the estate of the late Gershon Oliver Nyaronga claim ownership of the disputed land as it was previously owned by their father since 1965 after being granted ownership by the village authority. That also in 1974 their father extended another area by buying land owned by Airo Mlek. It has been the contention by the respondents that from there on (1965 and 1974 respectively), their father had been using the said land without any dispute. That themselves have been raised and brought there from their childhood (PW1 and PW2). PW3 and Pw4 corroborated the evidence of PW1 and PW2 that the said land belonged to the late Gershon Oliver Nyaronga and it is the first and the second appellants who are invaders of the said land.

It is further the testimony of PW4 the said suit land is owned by the Gershon Oliver Nyaronga who was given by village government. He described the boundaries at East there was Mzee Ongoro. The other side was river which was used as boundary. Other people used to hiring land from Mzee Gershon Oliver Nyaronga. That the area invaded by the second appellant was purchased by the late Gershon Oliver Nyaronga in exchange of cattle from the father of the second appellant.

The dispute arose in 2016 when the appellants invaded their land for agricultural activities alleging that the said land is theirs.

On the other hand, the 1st Appellant (DW1) claimed ownership of the said land from 1994 when he was given the said land by his father while it was a sugar cane farm and bananas. That it is true that the respondents' family arrived there in 1968 but were only given 3 acres. The remaining land they used to cultivate on agreement.

The second appellant denounced the fact that his father had sold his land in 1974 in exchange of cattle. He challenged this evidence as lacking support from any evidence. What he knows, the said area remained in possession of his father until in 1983 when he died. From there on, his mother became the administrator of the deceased estate who also died in 2013. It is in 2017 when the family of the respondents exceeded the boundaries and thus the current dispute.

DW3, testified for the 1st appellant testified that the land in dispute belongs to the family of Ondoto Nyiratho. That in 1994 the said Ondoto Nyiratho gave the farm in dispute to the first appellant which was a sugar cane and banana farm. That when the first appellant was given the said farm by Ondoto Nyiratho, he was 18 years old and he witnessed it. Others were his brother by name of Koyi Kitere, the said Nyiratho

(owner) and Ondoto Nyiratho (the father of Samwel). He wonders that that the said Samwel Ochieng is now a trespasser to his own land.

On this evidence, the trial tribunal gave judgment in favour of the respondents. This has aggrieved the appellants, thus the basis of this appeal grounded on a total of ten grounds of appeal, namely:

1. *That the learned trial District Land and Housing Tribunal chairman erred in Law and in fact, in hearing and determining this land case without hearing the evidence of FROLA AUMA NYARONGA 1st respondent and MONICA APIYO NYARONGA 2nd respondent who were necessary parties this case.*
2. *That the learned trial District Land and Housing chairman erred both in law and fact, when he held that the disputed suit land was allocated to the late GERSHOM OLIVER NYARONGA IN 1965 by Buganjo village Government whereas in fact, during that Material period there were no village Government is existence in Tanzania.*
3. *That the learned trial District Land and Housing Tribunal chairman, erred both in law and fact, when he failed to take judicial notice that village governments were established by statute during 1974 village settlement scheme (operation vijiji) in Tanzania*
4. *That the trial learned District Land and Housing Tribunal chairman, erred in law and fact, when he failed to take judicial notice that in the year 1965, the country had village Native Authorities and not village governments.*
5. *That the learned trial District Land and Housing Tribunal chairman erred in law and fact, when he held that the late*

Gershom Oliver Nyarongo, had extended the land which was allocated to him in 1974 during operation vijiji in Tanzania by buying the extended suit land from the late AIRO, without sufficient proof of eye local witnesses, who witnessed the said sale transaction and or documentary evidence to that effect.

6. *That the learned trial District Land and Housing Tribunal chairman erred both in law and fact, when he entertained the respondents who had no locus standi thus no appointment letters of Probate Administration of the Estate of the late Gershom Oliver Nyarango.*
7. *That the learned trial District Land and Housing Tribunal chairman, erred in law and fact, when he held that, the appellants had trespassed into the respondents claimed late Gershom Oliver Nyarango Estate Land and Crossing the River, which happens to be at kongo hamlet, Buganjo village, whereby the Appellants have been in Occupation since 1974 during operation vijiji in Tanzania todate 2021 a period of over 47 years now.*
8. *That the learned trial District Land and Housing Tribunal chairman, erred in law and fact in determining this land case without recording the opinions of assessors who tried this Land case.*
9. *That the learned trial District land and Housing Tribunal chairman erred in law and fact, in holding that the suit land belongs to the late Gershom Oliver Nyarango.*
10. *That learned trial District Land and Housing Tribunal Chairman, erred in law and in fact to order appellants vacate the suit lanad on which they have lived and or occupied since 1974 during Operation Vijiji in Tanzania todate 2021 a period of over 47 years now.*

During the hearing of appeal, the appellants appeared in person and unrepresented whereas the respondents enjoyed the legal services of Mr. Mligo, learned advocate.

The 1st Appellant on his part, submitted that closely reading the trial tribunal's record (evidence) and what was adjudged by the trial tribunal it is clear that the appellants' case is weightier than that of the respondents. Therefore the trial chairman erred in law in reaching that verdict. What was claimed has not been established by evidence.

Amongst the witnesses for respondents, none testified witnessing the giving of the said land to Mr. Nyaronga. The size of land lawfully purchased by the respondents has not been established, equally is the size of land purchased from the village authority.

As to when the respondent's father died, the respondents failed to make a reply. As who borders his land, he replied that he doesn't know. The respondents' testimonies were not straight as it was contradictory as to when the said farm was purchased. Is it in 1965, 1964 or 1966.

As what is the size of the land encroached, each respondent's witness testified a different story.

It was expected that there should have been application of laws in reaching judgment. There is no one law being mentioned in the said judgment. He doesn't think if a river can be a good boundary separating one's land from another.

He also argued that there is also an issue of Tribunal Assessors' opinion, have not been annexed with the case.

In all this, he concluded that the land in dispute is theirs and they are owning the said land from 1898 by way of customary inheritance. He humbly prayed that this appeal be allowed with costs and they be ordered to pay compensation.

The 2nd Appellant on his part submitted that they are aggrieved by the decision of the trial tribunal. That the respondent had purchased land from Airo Mlek in 1974 by exchange of cattle, there has never been produced any evidence on that. All the witnesses testified against the respondents. He is of the view that the decision of the trial tribunal does not hold legal value. It has not been clear how they got the said land. The size of their land is not mentioned and that they don't even know what is their land.

He prayed that that this appeal be allowed.

In countering the appeal, Mr. Mligo submitted that this appeal be dismissed with costs for the following reasons: That from first ground to the tenth grounds, there is none with merit.

He added that the dispute at the DLHT was for ownership of the said land. As per page 1 and 2 of the DLHT's record, it is clear that the testimony of PW1 was given that land in 1965.

In 1974, their father expanded his land from Airo Mleki (now deceased). From 1965, the appellant has been using the said land without any dispute. The said invasion happened in 2018. The boundaries were clear. Therefore between 2017 and 2018 witnesses testified how the appellant invaded the suit land from the original boundaries. There is abundant evidence how the 1st appellant left the river and expanded to their farm. There was no boundary seen beyond the river.

As the dispute was over land ownership, the trial tribunal rightly ruled in favour of the respondents.

That there was no legal provision cited by the trial court, it is not a hard rule that every judgment must bear provisions of law replied Mr.

Mligo. That the appellants are in long possession since 1898, is unfounded added Mr. Mligo.

In relying to the case of **Bhoke Kiatangita vs Makuru Membe,** Civil Appeal No 222 of 2017, CAT (unreported) at 7, he submitted that as the respondents have been in peaceful enjoyment of the said land since 1964 to date they are lawful owners of the said land. Had it been under the use of the appellants, for sure there would have been dispute from that time. With this, appeal is of no merit, he prayed that it be dismissed with costs.

In his rejoinder submission, the 1st Appellant maintained that the said suit land was purchased by the respondents, it has not been established. There is no any evidence to any claim put by the respondents. That there were village or District councils prior to 1984's is not true.

The 2nd appellant in his rejoinder submission prayed to maintain his submission in chief and concluded that the respondents had no any proof of their case.

I have critically examined the evidence in record and the parties' submissions in respect of this appeal. I am of the view that all grounds

of appeal can be condensed into one main ground of appeal whether the respondents being claimants at the trial tribunal established their claims against the appellants.

The law is, he who claims must establish the existence of facts for him to get the desired judgment of the Court (S.110, 111 and 112 of TEA, Cap 6, R.E 2022). In this case the respondents being administratrixs of the estate of their deceased's father claimed against the appellants that they invaded into the land of their father which he had been in occupation from 1965 and 1974. That their father had obtained ownership by being granted the said land by the Village Government in 1965. Further, in 1974 he added another land by purchasing it from one Mzee Airo (in exchange of cattle). Unfortunately, there is none of the documents establishing grant of the said land by the said Village Government. Neither has there been evidence of the purchase of the said land in 1974 from Mzee Airo.

On the other hand, the appellants claimed possession of the said land through traditional inheritance by their grandfathers and fathers who had been in occupation of the said land prior to 1968. And that by the time the said Gershon Oliver Nyaronga had arrived in that village,

was received by their grandfather (DW1) and was given only three acres of land.

According to law, (section 3(2)b of the TEA), a fact is said to be proved in civil cases, where its existence is established by a preponderance of probability. By proving or establishing evidence means that an alleged matter of fact, the truth of which if submitted to investigation, has been proved or disproved.

According to the facts of the case, what was expected by the respondents during the hearing of their case at the trial tribunal had to establish that their father had been granted the said land by Village Government and also another parcel of land which he had purchased it in 1974 from Mzee Airo. From the said allegations/claims, it needed evidence to proof the said facts. What was testified by PW1, PW2 and PW3 for the respondents, none had clearly established how the said Gerson Oliver Nyaronga got the said land. The claims that he got it by being granted by Village Government, is the fact that needed proof. None of the local leaders (by the said reign) who granted the said allocation to him, testified in that respect.

Otherwise in priority principle, it appears the appellants have established owning the parcels of land alleged to be invaded against the

respondents. On the other hand, the respondents' ownership over the said parcels of land, has not been legally established. In the case of **Kimaro vs Joseph Mishili t/a Catholic Charismatic Renewal**, civil Appeal no 33 of 2017, the court of Appeal at Dar es Salaam (unreported) at page 16 appreciated the application of priority principle. It stated

> *"The priority principle is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have titled over it, a party who acquired it earlier in point of time will be deemed to have better or superior interest over the other"*

With the evidence in record, the appellants have established being real owners of the said alleged invaded land prior to the respondents.

In my considered view, as far as the evidence in this case is concerned to the extent of the invaded land, I find this appeal is meritorious. The respondents had failed to establish in their evidence as to whether the land they occupy and possess which originally was owned by their father, extended to the area claimed to be invaded by the appellants. To the extent of the invaded land claimed by the respondents against the appellants, there has been no proof of that invasion.

That said, the appeal is allowed with costs. The area (land) alleged to be invaded by the appellants has not been established so.

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

F. H. Mahimbali

JUDGE

Court: Judgment delivered 30th day of September, 2022 in the presence of the Appellant, Mr. Mligo, Advocate for the respondents, and Mr. Gidion Mugoa – RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE