

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOKA DISTRICT REGISTRY
AT BUKOKA.

LAND CASE APPEAL NO. 40 OF 2022

(Arising from Land Application No. 40 of 2019 at Bukoba District Land and Housing Tribunal. Originating from Misc. Land Application No. 137/2021 in the High Court of Tanzania)

ELEMENS CLEMENCE (Administrator of estate

of Leopord Kajuna**APPELANT**

VERSUS

ENOCK KALUMUNA.....**RESPONDENT**

JUDGMENT

21st September, 2022 & 27th September, 2022

Isaya, J.

The Appellant is before this court challenging the decision of Bukoba District Land and Housing Tribunal (the DLHT) which dismissed his appeal on a point of objection that was raised by the Respondent against Leopord Kajuna who is deceased now. After the death of Leopord Kajuna, the Appellant was appointed to administer his estates. Therefrom, he stepped into his shoes, hence the appellant in this case.

The particulars of the dispute show that before he met the death, Leopord Kajuna, vide Application No. 40 of 2019, sued the Respondent at the DLHT claiming that the Respondent encroached into his land in 2005 located at Kabitego "D", Bushasha Village, Kishanje in Bukoba District and started using it

contending to be his own property. The Respondent objected the application contending that the application was filed out of time; after expiry of 14 years from the time the alleged encroachment was done and that Leopord was abusing the court process for instituting a fresh suit instead of appealing against the DLHT's decision in Application No. 137/2015 which nullified the Ward Tribunal's decision for being filed by the person who had no locus standi.

After hearing the parties on the objections raised, the trial tribunal sustained the objections and dismissed the application with costs. Aggrieved with that decision, the appellant, being the administrator of estates of Leopord Kajuna, has appealed to this court with only one ground faulting the decision of the trial tribunal for dismissing the application that:

- 1. That, the District Land and Housing Tribunal erred in law and in fact to uphold the preliminary objections raised by the defendant based on time limitation without taking into consideration that there was Land Application No. 137/2013 at Bukoba DLHT against the same parties in the same cause of action which gave to the rise of Land Application No. 40/2019 and hence wrong decision.*

At the hearing of the appeal, both parties appeared in person and unrepresented.

The Appellant prayed the court to adopt the grounds of appeal. He further stated that he believes the appeal was filed within time because the dispute at



the beginning was referred at the village authorities in 2012, thereafter the Appellant, acting for Leopord Kajuna sued the Respondent at Kishanje Ward Tribunal where it was decided in his favour. However, the decision of the Ward Tribunal was quashed by Bukoba DLHT in Land Appeal No. 137/2013 on reason that the current Appellant, who was the care taker of the Suitland for Leopord Kajuna, had no locus stand. After quashing, the said Leopord instituted the case as the actual owner which however was dismissed for being time barred, hence this appeal. He prayed this court to allow the appeal.

In response, the Respondent argued that appeal has no merit. That the DLHT was right to dismiss the application because the subject matter in Land appeal No. 137 of 2015 was the same with that of Application No. 40 of 2019. That the Appellant was supposed to appeal against Appeal No. 137/2015 and not filing a fresh application. He further stated that the DLHT was right to dismiss it for being filed hopelessly out of time; more than 14 years after the alleged encroachment. He prayed the appeal to be dismissed for lack of merit.

In rejoinder, the Appellant sought the appeal to be allowed because the deceased was ever since filing cases to dispute the encroachment which however, were dismissed on technicalities. He reiterated his prayer seeking the court to allow the appeal.

In this appeal, this court is moved to consider the ground of appeal advanced by the Appellant. To begin with, I should observe and find that the major issue



to be considered by this court is whether the case was filed out of time and whether the Respondent acquired the Suitland under adverse possession.

In regard with the first issue, in its ruling of 11/10/2019, the tribunal stated that the time limit started to run from 2005 when the Respondent alleged to have encroached the Suitland. Therefore, up to 2019 when Application No. 40/2019 was instituted, there was a lapse of 14 years, hence, Leopord was barred from recovering the land which was occupied for more than 12 years. The tribunal went further stating that Civil Case No. 2/2013 of Kishanje Ward Tribunal which bore Civil Appeal No. 137/2013 which was nullified and quashed by the DLHT was as good as there had never been any suit instituted before. Reading through, this court has to determine if the Respondent occupied the Suitland under adverse possession.

To begin, I have to point out that in our law of limitation, the doctrine of adverse possession is enshrined under Part I item 22 in terms of section 3 (1) of the Law of Limitation Act, Cap 89 R.E 2019 which provides that land should be recovered within 12 years after encroachment.

This doctrine is not applied blindly. There is, a long line of authority that provides on how the adverse possessor may acquire the land by adverse possession. The Court of Appeal in **Bhoke Kitang'ita vs Makuru Mahemba**, Civil Appeal No. 222 of 2017 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 his right to recover it within the time prescribed by law, such person (adverse possessor) acquires ownership by adverse possession"

The conditions that must be fulfilled by the person seeking reliance on adverse possession were pointed out by the Court of Appeal in the case of **The Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016 which quoted with approval the Kenyan case of **Mbira v. Gachuhi** [2002] E.A 137 (HCK) which made reliance on the cases of **Moses v. Lovegrove** [1952] 2 QB 533 and **Hughes v. Griffin** [1969] 1 All ER 460 where it was held that:

[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 animus possidendi;

(f) that the statutory period, in this case twelve 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 in the light of the foregoing/adverse possession would result."

Therefore, from the conditions set out herein above, it is emphasized that the adverse possessor have to prove that, all the time he was occupying the land, there was no interruption from the actual owner. In considering the time limit, the court also has to count the time from when the possessor started occupying the Suitland as per section 9 (2) of the Land Limitation Act (supra) to the time when the interruption was done.

At the DLHT, the objection was on time limit, that the deceased slept on his right for 14 years. For that case, it is undisputed that the Respondent had no right to own that land, rather he occupied it after being abandoned by the actual owner. Now, this court has to determine if there was abandonment which resulted to adverse possession. The DLHT in Land Appeal No. 137 of 2013 between **Enock Kalumuna v. Elemence Clemens** which originated from Civil Case No. 2 of 2013, at pages 5 and 6 of the judgment it stated that:



*"Since the respondent concedes that he sued on behalf of **Leopord Kajuna** who is still alive, we rule that it was improper in law. The alleged owner ought to have sued in his name and not in the name of the care taker herein the respondent...The alleged **Leopord Kajuna** is advised to initiate a fresh suit before a competent forum"*

A careful study of the record and the law, it is evident that the Respondent cannot say that he enjoyed uninterrupted possession for 14 years as was held by the trial tribunal. The Appellant who was the care taker of the Suitland took the actions against the Respondent on behalf of the actual owner, who was residing in Karagwe, by referring the matter to local leaders and thereafter filed the case at Kishanje Ward Tribunal which however, was quashed by the DLHT for lack of jurisdiction and locus standi. From the time the alleged encroachment started in 2005 to 2013 when the care taker filed a case at Kishanje Ward Tribunal, there was a lapse of 8 years, which is below 12 years.

Having filed the case at Kishanje Ward Tribunal in 2013, is evident that the Respondent was not freely enjoying the occupation of the Suitland. It shows that the actual owner took action through the person who was taking care of the Suitland. Therefore, the DLHT erred to say that quashing of the Kishanje decision amounted to as there had never a suit concerning that land.

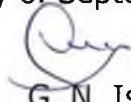


On the basis of the stated reasons, I agree with the appellant that the matter was filed within time; after 8 years of encroachment. The suit was not barred by limitation as it was held by the DLHT.

In the event, I find the appeal has merit. The dismissal order hereby set aside. and the same is allowed. The file to be remitted back to the trial tribunal to be heard on merit by another chairman with a new set of assessors. Since the matter is still continuing, costs to follow in the due course.


DATED at Bukoba this 27th day of September, 2022.




G. N. Isaya
Judge.
27/09/2022

The judgement delivered this 27th day of September, 2022 in presence of the parties in person.




G. N. Isaya
Judge.
27/09/2022