IN THE HIGH COURT TANZANIA

(DISTRICT REGISTRY OF SHINYANGA)

AT SHINYANGA

LAND APPEAL NO.44 OF 2021

(Arising from Application No.18/2019 before the District Land and Housing Tribunal for Kahama at Kahama, Hon. Paulos L.S Lekamoi, Chairman, dated 09/07/2021)

ANNA KULWA MAYUNGA.....APPELLANT

VERSUS

1. ROZA KIGABO
2. PETER MASANJA
3. PAUL LWAMALA
4. ZENGA GEORGE
5. MICHAEL JAMES LAMBO

..... RESPONDENTS

JUDGMENT

26th Sept & 6th October, 2022

NONGWA, J.

The appellant alleged to have acquired the suit property from the 2nd respondent through the 3rd respondent after she authorized him to purchase it on her behalf. The 1st respondent came with the same story that the appellant authorized the same to 3rd respondent to purchase, who then did it from one (the late) Vincent. In the District Land and Housing Tribunal for Kahama, Land Application no. 18 of 2019, the appellant herein, was claiming against the 1st respondent for resisting on the suit property after being invited there at and, subsequent disposal of part of the suit property to the 4th and 5th respondents. The trial tribunal blessed the 1st respondent as lawful owner of the suit property,

disposition of part of the suit property to the 4th and 5th respondents by the 1st respondent. Aggrieved with the decision, the appellant appeals to this court on the grounds that I wish to reproduce as they are;

1. *'The honorable trial chairman improperly evaluated evidence on record regarding ownership of the suit property by the appellant reaching to the erroneous decision in favour of the 1st Respondent.*
2. *The honorable trial chairman wrongly applied the doctrine of adverse possession in granting the suit property to the 1st Respondent, contrary to its legal applicability.*
3. *The honorable trial chairman erred in law and fact in holding that the appellant failed to prove her case regarding ownership of the suit property at the required standard.*
4. *The honorable trial chairman erred in law and fact in holding that the 4th and 5th respondents lawfully purchased parts of the suit property from the 1st respondent.'*

The appellant prays the court to set aside the decision of the trial tribunal, hold that the appellant is lawful owner of the suit property, hold that the sale transaction of parts of the suit property among 1st, 4th and 5th respondents is nullity and costs of this appeal and that of lower tribunal be provided for.

This appeal has been heard by way of written submission, the appellant has been represented by the learned counsel Bakari Muheza, while the respondents no. 1, 4 and 5 have been represented by Mr. Festo Lema. The rest did not file any submission.

In his argument in chief, the counsel for the appellant combined all the four grounds together and submitted that there are two antagonistic evidences

regarding ownership of the suit property, that of the appellant and that of the 1st respondent. That the appellant alleges to have acquired the suit property from the 2nd respondent through the 3rd respondent after she authorized him to purchase it on her behalf. The 1st respondent has come with the same story that she authorized the same 3rd respondent to purchase, who then purchased it from one (the late) Vincent. In the circumstances, the 3rd respondent is/was the one to decide this matter and his evidence was clear that it is the appellant who authorized him to purchase the suit property on her behalf, did it from the 2nd respondent. His evidence to that effect was not discredited.

The counsel noted that, in his judgment, the Honourable trial chairman, at pages 12-13 of the printed judgment, tried to challenge the fact by referring to the written statement of defence (WSD) of 3rd respondent, specifically referring to paragraph 3 of the same that the 3rd respondent did not know/admit the said suit property. This finding, is unfounded since by face of it, it appears to be an error of which the Honourable trial chairman could have cured if he was really led by justice in adjudicating the matter because, even the WSD of the 3rd respondent initially and correctly noted the contents of paragraph 3 of the application in his paragraph 1 of the WSD.

The counsel argued further that the trial chairman deliberately closed his eyes on paragraph 1 of the WSD of the 3rd respondent and referred paragraph 3 plain, leaving (3.1 and 3.2) in which the disputing facts are contained. Paragraph 3 of the WSD had nothing relevant to the matter before the trial tribunal. The trial chairman had a chance to rectify the error by ordering an amendment to the WSD for the ends of justice as the 3rd respondent lacked legal representation. Not to take the error as an advantage in favour of the 1st respondent.

The counsel lamentably, submitted that the trial chairman proceeded to try to show contradiction of the evidence of the appellant and her witnesses including that of the 3rd respondent without completely touching on the 1st respondent's evidence as to how she became at the suit property. He referred Section 3 (2)(b) of the Evidence Act, Cap.6 R.E 2019 which provides for standard of proof in civil cases as of preponderance of probability and concluded that in this matter, the trial chairman did not give himself a chance to make analysis of evidence of both parties. That no any witness of the 1st respondent (SU2, SU3, SU4 and SU5) who testified and/or even proved how the 1st respondent acquired the suit property. All her witnesses mentioned herein above concentrated on love relationship between the 1st respondent and the 3rd respondent which a very irrelevant factor in the instant matter. Moreover, the witnesses told the trial tribunal that they found the 1st respondent on the suit property and that their evidence as to how the 1st respondent acquired the suit property is hearsay one.

The counsel also drew the attention of this court that in granting the suit property to the 1st respondent and dismissing the application, the trial chairman had in mind the doctrine of *adverse possession* in favour of the 1st respondent, as the 1st respondent alleges to have acquired the suit property by purchasing it. On the other hand, evidence of the appellant reveals that the 1st respondent was an invitee on the suit property.

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, therefore, the trial chairman's holding/finding that the 1st respondent is lawful owner of the suit property by staying thereat for the said period of time and so, being the lawful owner of the suit property, had a good title to pass to the 4th and 5th respondents; is unfounded. That another evidence by the appellant which was

supported by AW-3 and SU-6 (3rd respondent) is to the effect that they sat a family meeting whereby the 1st respondent handed over the suit property before she successfully requested Tsh200,000/- as costs for completing toilet building at her own house, the piece of evidence that was disregarded by the chairman the counsel urged this Court to allow the appeal with costs by setting aside the decision of the trial tribunal and/or as prayed in the memorandum of appeal.

Responding to what the appellant's advocate has submitted in chief, the counsel for the respondents stated that at the trial this crucial witness testified contrary to what the appellant told the tribunal that, at her amended application that was filled to the tribunal on 29/03/2019 the appellant stated to own the dispute land since 1980 whereas 3rd respondent bought it on her behalf, at the same time 3rd respondent in his evidence told the tribunal the appellant approached him in 1982 to look for apiece land to purchase and he got one with house and negotiated for business, in consideration of Tsh 3,000/= that the appellant and 3rd respondent are at varience in that each testified a fact which are in contradiction to the year of business transaction. That the evidence of 3rd respondent is not reliable, because, he did not front the seller of whom he purported purchase the land from and even the document in effecting the same were not tendered.

The counsel for the respondent argued further that the appellant also failed to tell the tribunal who sold the land to her, she did not know the vendor of piece of land purported to own from 1980 rather was told by Paul Lwamala that he bought land for her. The appellant admitted that she did not know the seller rather is known by Paul Lwamala the 3rd respondent herein again, 3rd respondent is not aware of the land purported to buy on behalf of Anna Mayunga because in his written statement of defense at paragraph 3 replies that are the

facts that the applicant should prove, this confirmed that he too did not know the land which he purported to buy on behalf of the appellant.

The counsel argued that Parties are bound by their pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with pleaded facts must be ignored, the counsel referred the case of **Happy Kaitika Burilo T/A Irene Stationery and another Vs International Commercial Bank (T) Limited Civil Appeal No. 115** of 2016 (Unreported) CAT at Dar es salaam.

It was the submission of the respondents that for the question of invitee to stand, the appellant was obliged in law to prove when she invited the 1st respondent in her land and had duty of proving to be owner of the disputed land, a duty that has failed to be proven, therefore prayed that the appeal be dismissed with costs.

Having gone through the records, proceedings and I have considered the two sides submission, I find that the main issue here is on the doctrine of *adverse possession,* as to whether the trial chairman wrongly applied the doctrine of adverse possession in granting the suit property to the 1st Respondent. This will dispose all of the rest of the grounds.

I acknowledge the argument by the counsel for the applicant through the cited case of **The Registered Trustees of Holy Spirit Sisters Tanzania Vs. January Kamili Shayo and 136 Others,** Civil Appeal NO.193 of 2016 (CAT-Arusha, unreported), that possession and occupation of land for a considerable period of time do not, in themselves, automatically give rise to a claim of adverse possession.

It is provided under the law of Limitation that the period of limitation to recover land is 12 years 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. This principle of adverse possession has been discussed in number of court decisions, in the **Land Case Appeal No. 113 of 2020 Tanzania Electric Supply Company Ltd Vs Hellen Byera Nestory,** High Court of Tanzania, District Registry of Bukoba, Hon. Kilekamajenga, J. referred the case of **Bhoke Kitang'ita v. Makuru Mahemba, Civil Appeal No. 222 of 2017 CAT at Mwanza** (unreported), where the Court of Appeal 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 (the adverse possessor) acquires ownership by adverse possession.'*

It has been the argument by the appellant's counsel that the trial tribunal wrongly applied the principle adverse possession and favored the 1st Respondent. However, as stated before, there are prerequisites for the principle of adverse possession to stand, the same will be tested in the present case to see if they were met.

In **Bhoke Kitang'ita** (supra), the Court of Appeal adopted the approach developed in a number of cases including the **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 that;

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.'

Now, based on the above position of the law, even if the appellant could have proved to have bought the land through the 3rd respondent as she claims, there had been absence of possession by the true owner through abandonment ever since 1980s, the 1st respondent's occupation and possession of the land for over 35 years without interruption was sufficient to grant ownership under the doctrine of adverse possession. The 1st respondent lived uninterruptedly to the extent of burying her two children on the same land. Clearly, the suit was time-barred and the respondent had lost her right to recover the land.

The trial tribunal correctly applied the doctrine of adverse possession. Trial tribunal judgment and decree upheld; the appeal has no merit consequently it is hereby dismissed with costs.

It is so ordered.

Dated at Shinyanga this 6/10/2022.

THE HIGH COURT OF TANZANIA

V.M. NONGWA
Judge
6/10/2022