IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO. 129 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 46 of 2015)

EMMANUEL SARUNGI..... APPELLANT

VERSUS

KOYI SARUNGI..... RESPONDENT

JUDGMENT

A.A. MBAGWA, J

This is an appeal against the judgment and decree of the District Land and Housing Tribunal for Tarime at Tarime in Land Application No. 26 of 2015.

The appellant, Emmanuel Sarungi instituted a land case against the respondent, Koyi Sarungi claiming that the respondent had encroached his land measuring about five (5) acres situated at Nyarongi in Utegi village within the district of Rorya.

According to the evidence on record, the appellant and respondent are brothers of the same father but different mothers.

The appellant who stood as PW1 in the trial Tribunal testified that he is the owner of the suit premises as he was given the same by his late mother who was the 4th wife of the late father Chief Sarungi in 1986. According to the appellant's evidence, no sooner had he been given the disputed land than the respondent encroached the suit land. According to the appellant, the respondent built the house and planted trees namely, **eucalyptus** therein. In addition, the appellant called other three witnesses to testify in support of his case namely, William Nyakoi Sarungi (PW2) and Wiva Osoro Sarungi (PW3) and Rose Jacob Sarungi (PW4). William Nyakoi Sarungi (PW2), Wiva Osoro Sarungi (PW3) are children of the appellant's brother whereas Rose Jacob Sarungi (PW4) is the appellant's wife. PW2 and PW3's testimonies were to the effect that they were told by their parents that the land in dispute belongs to the appellant. Apart from that hearsay PW2 and PW3 had no other evidence to buttress the appellant's contention of ownership over the suit premises.

Whereas the appellant testified that the respondent invaded the land in 1986, his wife's evidence (PW4) was to the effect that the respondent trespassed on the disputed land in 2007.

In defence, the respondent refuted the appellant's claims. The respondent called two witnesses to wit, himself Koyi Sarungi (DW1) and his mother Dorice Awino Sarungi (DW2). Besides, the respondent produced nine (9) documentary exhibits. The respondent stated that he was given the disputed land by his mother in 1999 after he retired from public service. The respondent continued that he has been using land since in 1999 until in 2013 when the dispute arose. His evidence was supported by his mother who clearly told the trial Tribunal that she got the disputed land from her late husband Chief Sarungi. DW2 said that her husband gave her two pieces of land one being the suit premises which she was using for agriculture. DW2 stated that she was using the land for cultivation until in 1999 when she gave it to the respondent. DW2 expounded that the appellant's mother was also given land for cultivation and that is where the appellant is now living.

After hearing the evidence of both parties, the trial Tribunal on 25th August, 2021 visited the locus in quo and on 9th September, 2021, both assessors gave their opinion in favour of the respondent. Thereafter, the Chairman went on to compose judgment which he delivered on 22nd October, 2021. However, the trial Chairman did not evaluate the evidence adduced before the Tribunal to wit, he did not go into the merits of the case instead he

picked a portion of the appellant's testimony where the appellant said that the respondent encroached the suit land in 1986. The trial Chairman capitalized on this piece of evidence and held that from 1986 to 2015 when the suit was instituted is about twenty-seven (27) years as such, the trial Chairman concluded that the suit was out of prescribed time of twelve years hence contrary to the provisions of the Law of Limitation Act. Astonishingly, the trial Chairman proceeded to declare the respondent a lawful owner of the suit premises despite his findings that the suit was out of time before the Tribunal.

The decision of the trial Tribunal did not appease the appellant hence he filed this appeal. In his petition of appeal the appellant advanced three grounds;

1. That, the Hon. Chairman erred in law and in fact by ruling that the application was time barred while there were testimonies on different dates which he ought to have analysed
2. That, the Hon. Chairman erred in law and in fact by his failure to take into account the testimonies of other witnesses who testified before it.
3. That, the Hon. Chairman erred in law and fact by his failure to analyse the evidence adduced before the Tribunal.

When the appeal was called on for hearing, the appellant was represented by Deya Outa, learned advocate whereas the respondent enjoyed services of Emmanuel Werema, learned advocate.

Mr. Outa combined the 2nd and 3rd grounds and argued conjointly whilst the 1st ground was elaborated independently.

Submitting in support of the 1st ground, Mr. Outa complained that the Chairman erred to rule that the application/ the case was time barred. He clarified that the Chairman erred in law by singling out a sentence and leaving other evidence unalysed. Had the Chairman analysed the evidence holistically, he would have discovered that the PW1 Emmanuel Ochieng Sarungi had problems in mentioning the dates, Mr. Outa submitted. The counsel exemplified that PW1 said that his mother died 1976 but during cross examination at page 17, he changed and said that his mother died in 1978 and that he was given the land in dispute by his mother 1988. It was therefore the counsel's submission that the dispute arose in 2007 as testified on by PW4 who is PW1's witness. The appellant's counsel further argued that paragraph 5 (vii) of the application (plaint) also speaks clearly that the dispute started in 2007 and the Written Statement of Defence does not say as to when the respondent encroached the land in dispute.

Given his PW1's age, it was very likely to confuse the dates, Mr. Outa submitted. He thus prayed this court to use the evidence of PW4 who was using the land in disputes.

With regard to the 2nd and 3rd grounds of appeal, Mr. Outa submitted that the Chairman erred in law for his failure to properly analysed the evidence.

He elaborated that the respondent Koyi Sarungi testified that he was given the land in dispute in 1999 whereas the respondent's mother DW2 Dorice Awino Sarungi said that she is the one who gave the respondent the disputed land without mentioning the year. The appellant's counsel continued that DW2 said that she had other two sons who are living in the land different from the suit premises and that it was conceded by DW1 that at one point the disputed land was used by the Ministry of Communication and Works but DW2 denied this fact.

Mr. Outa concluded that by considering the evidence in totality, the appellant is the lawful owner of the land in dispute. And since this is the first appellate, the counsel beseeched the court to reevaluate the evidence and arrive at its own conclusion. He prayed the appeal to be

allowed and the appellant be declared lawful owner along with an order of costs.

In response to the 1st ground, Mr. Emmanuel Werema, learned advocate strongly submitted that the Tribunal was right in finding that the suit was time barred because the testimony of PW1 was clear that the respondent trespassed into the land in 1986. However, the respondent's counsel remarked that having held that the case was out of time, the Chairman ought to strike it out and not to dismiss. He urged the court to remit the case file to the trial Tribunal so that the Chairman may compose a new judgment with the effect to strike out.

Pertaining to the evidence of PW4 who said that the dispute arose in 2007, Mr. Werema argued that this came as an afterthought after the counsel failed to cure the anomaly in re-examination of PW1.

The respondent's counsel stressed that the respondent acquired the land in 1999 and used it peacefully until 2013 when the dispute arose.

With regard to the fact that there are no neighbours of the same mother, Mr. Werema said that this fact was well explained by DW2 and there was no cross examination on that important fact.

Nonetheless, the counsel conceded that the trial Tribunal was wrong to declare the respondent a lawful owner because the proceedings were incompetent and the matter was not determined on merits.

In a brief rejoinder, Mr. Outa submitted that PW4's evidence was not an afterthought because her testimony was so straight.

Upon hearing the rival submissions from the counsel, I had an occasion to peruse the record of the trial Tribunal. In the pleadings, particularly, the application (plaint), it was clearly pleaded at paragraph 5 (vii) that the cause of action accrued in 2007 when the respondent trespassed into the disputed land, removed original boundaries and planted trees. Further, this version was supported by the appellant's wife one Rose Jacob Sarungi (PW4) who testified that the respondent encroached the suit premises in 2007. However, as rightly pointed out by both counsel, the appellant PW1 testified that the encroachment occurred in 1986. On the contrary, the respondent's testimony was that he started using the land in 1999 until in 2013 when the dispute arose.

Since these controversies arose in the course of evidence, it was upon the trial Chairman to analyse the evidence holistically and arrive at the

decision as to which is the correct version. It was not proper to simply pick a sporadic statement of a witness and proceed to rule that the matter is time barred whereas the pleading (plaint) and the testimony of PW4 were to the effect that the dispute arose in 2007. More worse, the chairman did not afford the parties the opportunity to address him on the time limitation. This was fundamental irregularity as it violated the principle of natural justice i.e., right to be heard. See **EX-B 8356 S/SGT Sylvester S. Nyanda Vs. The inspector General of Police and the Attorney General**, Civil Appeal No. 64 of 2014, CAT at Mwanza. In the premises; I uphold the first ground of appeal that the trial Chairman erred in law and fact to hold that the suit was time barred.

Another aspect which I find it relevant to determine is the trial Tribunal's findings that the respondent is the lawful owner. I would hastily hold that the judgment of the trial Tribunal is tainted with fatal anomalies. On the one hand, the Tribunal found the matter out of time and on the other hand, it proceeded to determine it on merits by declaring the respondent lawful owner of the suit land. Admittedly, these are two incompatible courses which in law cannot co-exist. It is common cause that once the matter is time barred, it is incompetent before the tribunal and therefore

the court or tribunal has no jurisdiction to try it. The only remedy for time barred suit is to dismiss it and not more. See the cases of **MS. P & O International Limited vs Trustees of Tanzania National Parks,** Civil Appeal No. 265 OF 2020, CAT at Tanga and **MM Worldwide Trading Company Limited and 2 Others vs National Bank of Commerce Limited** Civil Appeal No. 258 OF 2017, CAT at Dar Es Salaam.

In view of the above deliberations, it is my considered findings that the trial Chairman erred in law and fact to hold that the suit is time barred and yet proceeded to declare the respondent lawful owner of the suit premises. In consequence, I quash and set aside the judgment and decree of the Trial Chairman dated 22nd October, 2022. I hereby direct that the trial Tribunal to recompose the judgment by determining the suit on merits i.e., by wholly evaluating the evidence of both parties. Thereafter, whoever is dissatisfied with the findings may take appropriate actions. Given the circumstances of the case, each party should bear its own costs.

It is so ordered

The right of appeal is explained

A.A. Mbagwa

JUDGE

03/10/2022

Court: Judgment has been delivered in the presence of respondent and in absence of the appellant this 3rd October, 2022

A.A. Mbagwa

JUDGE

03/10/2022