IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT TABORA

LAND APPEAL NO. 1 OF 2019

(Originated from Land Application No.53 of 2016 Nzega District Land and Housing Tribunal)

EZEKIEL MHOJA (As Administrator of estate of the late Mhoja Dotto)..APPELLANT

VERSUS

SALU SAMWEL...1ST RESPONDENT
MILEMBE MALEHIWA..................................2ND RESPONDENT

JUDGEMENT

Date of Last Order: 13/12/2022

Date of Judgment: 15/12/2022

AMOUR. S. KHAMIS, J:

This is an appeal against the decision of the District Land and Housing Tribunal of Nzega in Application No.53 of 2016 whereby the Appellant Ezekiel being administrator of estate of the Late Mhoja Dotto, unsuccessfully sued the Respondents, Salu Samwel and Milembe Mahehiwa, for trespassing into about 26 acres of the land alleged to have been the land of his late Father who acquired the same in 1963.

The allegation was strongly disputed by the respondents who claimed to have been in possession of the said land since Villagelization as they were allocated the said land in 1975.

Upon hearing the evidence of both sides, the trial Chairman entered judgment in favour of the respondents by declaring them the lawful owner of the disputed land.

The appellant was aggrieved by the decision. Hence, lodged this appeal and raised four grounds (4) grounds of appeal as follows:-

1. *That the Trial Tribunal erred in law and facts in holding in favour of the respondents and that the respondents have been using the land over 40 years undisturbed.*
2. *That the Trial Tribunal erred in law and facts in holding in favour of the respondents basing its judgment on the earliest case which was nullified by the High Court by Songolo J.*
3. *That the Trial Tribunal erred in law and facts in ruling in favour of the respondents regardless of the weak evidence by the respondent.*
4. *That the Trial Tribunal erred in law and facts for using interpreter who was neither sworn nor affirmed.*

Pursuant to the order of this court dated on 21/9/2022 this appeal was disposed by way of written submission. Actually, I am grateful as both parties complied with the schedule and file their submission on time.

In support of the appeal, the appellant argued that the reasoning of the trial Chairman in his judgment does not based on true facts rather on false hood of the earliest case involved one Mapesa Mhija and not the appellant. he argued that there is no evidence tendered by the respondent to prove that the said Mapesa Mhoja wasa an administrator of estate of the Late Mhoja Dotto and there is no evidence to prove that the two are had conflict over the disputed land.

He contended that the said early case could not be of any help to the respondents because it was overturned by the High at the appellate stage by Hon. Songolo as he then was whereby the judgment was entered in favour of Mapesa Mhoja and the respondent did not prefer any appeal against the said decision.

The appellant argued further that there is no evidence to prove that the respondents had stayed on the disputed land over 40 years as suggested since the evidence shows that the respondents migrated to Mwanzwilo Village from Itebele Village

choana ward Kahama District Shinyanga Region in 2016 and when the dispute arose in 2019 the respondents were in disputed land for 3 years only.

The appellant argued that there is heavy evidence to prove that the Late Mhoja Dotto has been in occupation of the suit land since 1963 and when he died in 1977 the same passed to his beneficiaries under the administrator one Ezekiel Mhoja ad later to current Admninstrtaor Mayunga Mhoja.

He also submitted that the interpreter used during trial was neither sworn nor affirmed as required by the law of evidence. He therefore prayed for the court to quash and set aside decision of the Trial Tribunal.

In response to the grounds of appeal, respondent strongly resisted the appellant's submission and argued the 1st, 2nd and 3rd grounds of appeal altogether as they all challenge the evaluation of evidence that led to the finding that the trial Tribunal made.

The respondent was of the view that the argument that the evidence tendered was false are brought by way of submission by the appellant hence submission cannot challenge evidence by raising new facts which do not form part of the record. Therefore,

the letter annexed in the submission should be expunged since they are not part of evidence and cannot be used to challenge the decision of the lower Tribunal since that would be unjust.

To support this argument, he referred this court to the case of **Attorney General Vs.Amos Shavu(2001) TLR 134 (CA)** it was held that:-

'The decision of the court can be founded only upon evidence adduced in court but not on information privately obtained in the absence of the parties.'

He also cited the case of **Tuico at Mbeya Cement Company Ltd Vs. Mbeya Cement Company Ltd and Another (1005) TLR 41 Page 48** the court stated that:-

'It is now a settled, that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annextures, except extra judicial decisions or textbooks, have been regarded as evidence of facts.'

The respondent argued that the evidence is so clear that the respondents have been in occupation of the disputed land since Ujamaa Village 1975. He contended that the appellants allegation that they acquired the land before villagelization does

not have substance. He cited the case of **David Nyangi Nyakibary Vs. Ngiti Mwita Chacha & 3 Others, OC, Civil Appeal No. 53 of 2000, HC, Mwanza, (Unreported)** it was held that: -

> *'I would go further to say that, even if the appellant's people were in time to claim the land, they say they inherited from fore fathers, the respondent's allocation of that piece of land to them by the village allocation committee, was lawful. In those times of operation vijiji, those whose land got reallocated, lost those pieces of land for good.'*

The respondent submitted that since the decision based on the weight of evidence, there is nothing to fault the trial Chairman, since there was a clear evaluation and analysis of evidence, the court relied on the evidence as a whole by looking at the evidence of neighbors, when was the land acquired, the period of undisputed possession and at the end the conclusion was vivid and any other reasonable adjudicator would have held so since the law and evidence on the balance of probability demand such finding.

Regarding to the 4th ground of appeal, respondent argued that the issue of interpreter is not supported with evidence and

record do not depict the same and cannot be used to impeach the Tribunal's record. He added that even if there was such irregularity since will be cured by section 51(1) (a) and 45 of the Land Dispute Act Cap 216 R.E.2002. He therefore prayed for the appeal to be dismissed with costs.

I have considered the grounds of appeal, the entire record of this appeal as well as the submissions presented by both sides which are in the record. Basically, the appellant is challenging the District Land and Housing Tribunal to have decided against the weight of the evidence and secondly, to have based its decision on the law of limitation.

Upon re-evaluating the evidence on record, I have noted that the evidence on record was properly and critically evaluated by the trial chairman and all the principals of evaluating evidence were adhered.

It is my settled view that that since the appellant's allegations are based on the evidence. This being the appellate Court is not in a good position to assess the evidence properly as it only read transcripts unless otherwise the trial Court acts on a wrong principle in evaluating the evidence before, See the case of ***MATERU LEISON & ANOR V REPUBLIC SOSPETER* [1988] TLR 102** where it was held that and I quote;

> *"Appellate Court may in rare circumstances interfere with trial Court findings of facts. It may do so in instances where trial Court had omitted to consider or had misconstrued some material evidence, or had acted on a*

wrong principle or had erred in its approach to evaluating evidence."

This position was also fortified by the Court of Appeal of Tanzania in case of ***ALI ABDALLAH SAID V SAADA ABDALLAH RAJAB* [1994] TLR 132** and it was held that:-

"In the absence of any indication that the trial Court failed to take some material point or circumstance into account, it is improper for the appellate Court to say that the trial Court has come to an erroneous conclusion.

The Court further held that where the decision of a case is wholly based on the credibility of the witnesses then it is the trial Court, which is better placed to assess their credibility than an appellate Court, which merely reads the transcript of the record."

In the light of the above, I am of the settled view that the decision of the trial Tribunal was proper as it based on the weight of evidence. The record shows during Trial the evidence of the respondents were stronger compared to that of the appellant.

The record shows that the respondents were in the suit property since 1975 and that they have been occupying the said land undisturbed since then. The Appellant in his testimony during trial alleged that his father died in 1977 and the respondent were there in the suit land since 1975.

In a simple analysis if at all the alleged disputed land belonged to the Appellant's father. He would have claimed before he died. But the Appellant has come to claim the disputed land after the death of his father. The record shows that the

respondents have been in occupation of the disputed land before the death of the Appellant's father even after the death of the Appellant's father the land in disputed have been in continues utilization of the respondents.

The respondents were able to prove the boundaries of their land and the neighbors came to testify that the land belongs to the respondents. Unlike the Appellant who failed to mention any of the person that he knows to be his neighbor.

It is my settled view, that the evidence adduced by respondent and their witnesses during trial were very strong and believable because the witnesses were around when the land in dispute was allocated to the respondents in 1975

Moreover, the evidence of the respondents shows that they have been utilizing the said land since 1975 without interruption. There is nothing in the evidence to suggest that there were restrictions given to the respondents.

In the light of the above, I consider that the disputed land belongs to the respondents. Therefore, it was proper for the trial Tribunal to declare the respondent as lawful owner since they have been in occupation of the said land over 40 years.

It has been a position of law that, long possession which is not interrupted gives right of land owned by another.

Under the equitable principle of adverse possession Mzava, J.K as he then was) citing with approval the cases of **SHABAN NASSORO V RAJABU SIMBA (1967) HCD 233** and **BALIKULIJE MPUNAGI V NZIWILI MASHENGU (1968) HCD 20,** held that: -

"Where a person occupies another land over a long period and develop it, and the owner knowingly acquiesces, such a person acquires ownership by adverse possession."

In the light of the above, I find the trial Tribunal was proper to declare the respondent is the lawful owner of the suit land basing on the principle of adverse possession.

In the premises, I do not find any reason to depart from the decision of the trial tribunal since I find the decision is sound as such, I will not disturb it. I am upholding the said decision. Consequently, I find the appeal to have no merit and is liable to be dismissed. That said, this appeal is dismissed with no orderd for costs.

THE HIGH COURT OF TANZ

AMOUR S. KHAMIS.

JUDGE

15/12/2022

ORDER

Judgement delivered in open Court in presence of the appellant and both respondent in person.

Right of Appeal is Explained.

THE HIGH COURT OF

AMOUR S. KHAMIS.

JUDGE

15/12/2022