

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY OF MBEYA
AT MBEYA

MISC LAND APPEAL NO. 16 OF 2021

(Arising from land appeal number 37 of 2018, the District Land and Housing
Tribunal for Mbeya at Mbeya. Originating form Land Dispute No.28 of 2018
Chipaka Ward Tribunal)

1. Mida Sinyinza(*An Administrator of the estate*
of the late Paulo Peter Sinyinza)**APPELLANT**

VERSUS

ENEAH A. MWAKASITU.....**RESPONDENT**

EXPARTE JUDGEMENT

Date of last order: 27.10.2022
Date of Judgement: 02.11.2022

Ebrahim, J.:

Having failed at the Ward Tribunal and the District Land and Housing Tribunal, the appellant herein has lodged this second appeal raising four grounds of appeal as follows:

- 1. That, the 1st Appellate Tribunal erred in law and in fact by pronouncing judgment without considering opinion of assessors.*

2. *That, the lower Tribunal erred in law and in fact by pronouncing judgement in favour of the Respondent without considering that there was clear non-joinder of the necessary party.*
3. *That, the lower Tribunals erred in law and fact by pronouncing judgement in favour of the Respondent without considering the Appellant's evidence which proved the case to the contrary.*
4. *That, the trial Tribunal erred in law and fact by entertaining matter which it has no jurisdiction.*

This appeal proceeded ex parte after the respondent refused to accept service as per the affidavit of service of summons dated 5th October, 2022.

The background of the matter as gathered from the proceedings on record is that the appellant **(SM1)** sued the respondent at the ward Tribunal claiming that the respondent has invaded into his land. According to his testimony at the Ward Tribunal, they have been born and living at Msongwa Street as the family of Mzee Sinyinza. The disputed area is like 50 acres but they had sold some pieces of land and remained with a portion for their use. The remained piece of land was at one time encroached by one Sichilima Eightson, their neighbor. However, upon being informed of the encroachment, the

said Sichilima admitted the claim and it was when they decided to put some bricks so that they can start erecting a building. It was then that the respondent claimed that the piece of land is his. The appellant stated that the respondent has been cultivating into their land for more than 15 years. The appellant called one **Partson Philimon Sindiya (SM2)** who testified that he was neighbouring the appellant and the disputed land was of Jonathan Simjanza including the area where the respondent built his house. She denied to know the respondent. Responding to further questions, she admitted that it was her husband who bought their land therefore he is the one who knows about the land. She admitted further that she has never been involved into the dispute concerning the disputed land.

On her side, the respondent testified that she has been using the land uninterrupted for 25 years and she bought the same from Eighton Sichilima. She said the disputed land is $\frac{3}{4}$ of an acre and together with her husband, she bought it for Tshs. 10,000/-. She mentioned Eighton Sichilima and Eliudi Mbala as her witnesses. Responding to questions put before her, she said the area was just a forest with trees.

The respondent called one **Eighton Sichilima (SU2)**. He told the trial Tribunal that it was him who sold the disputed land to the respondent and the appellant is just a trespasser. He testified further that the other side was being cultivated by Jonathan Simjanza who left for Zambia. He said he knows SM1 is not bordering him and insisted that he was the one who allocated the land to the respondent estimating the size to be one acre. Upon being probed as to whether he sold or gave it to her, he responded that he sold it to the person who was using it. The third witness for the respondent was **Elias Lugara (SU3)**. He testified that he purchased land at Msongwa area in 2010 and moved to his house in March, 2012. He wanted to expand the area but he was told that the area is the property of one Sichilima and he has already sold it to Mzee Mwakasitu. He testified further that the area was allotted into pieces and they were the properties of Mzee Sichilima's children. He said when he was moving to the area, it was a virgin land but long ago it was being cultivated by Mzee Isaac Mwakasitu and on the west side it was bordering Sichilima and Siyinja who however have already sold their land. He stated also that when he was buying the piece of land, he involved Siyinja and Mwakasitu. **Eliudi Fasy**

Mbala(SU4) testified that he bought his land in 2008 but he has been seeing Mzee Mwakasitu cultivating and developing the land since year 2005. He said he has just known Siyinza and has not seen him before apart from Mzee Mwakasitu. He stated also that he was told by Mzee Mwakasitu that he purchased the land from Sichilima's.

The trial Tribunal after considering the evidence presented before her found that the respondent has been using the disputed land uninterrupted for a long time (15 years) and that the appellant did not take any measures. The trial chairman invoked the doctrine of adverse possession against the appellant and declared the disputed land to be property of the respondent and ordered the appellant to remove his bricks from the area.

Aggrieved, the appellant unsuccessfully preferred an appeal at the District Land and Housing Tribunal. The DLHT disagreeing with the two assessors found the claim by the appellant to be time barred as she has instituted it after the passage of 22 years after the death of the deceased. The appeal was therefore dismissed, hence the instant appeal.

As alluded earlier, this appeal proceeded ex parte as per the reasons explained above. The appellant appeared in person, unrepresented.

She simply adopted her grounds of appeal and added that she was not present when the judgement was delivered.

In determining this appeal, I shall begin with the fourth ground of appeal that the trial Tribunal had no jurisdiction to entertain the matter.

The appellant has not given explanation as to what branch of jurisdiction she is referring. Nevertheless, upon going through the records, I found that the case was filed at the Ward Tribunal in 2017. At that time, the Tribunal had jurisdiction to adjudicate on land matters. It was vide **Act No. 5 of 2021, 11th October 2021** that the powers of the Ward Tribunal on adjudication were stripped off and remained with the powers to mediate only. The appellant has neither stated on the value of the land, therefore the jurisdictional issue as mentioned by the appellant to have no basis the fourth ground of appeal is therefore unmeritorious.

The appellant has complained on the first ground of appeal that the 1st appellate Tribunal did not consider the opinion of the assessors. Going through the judgement of the 1st appellate Tribunal, the chairman firstly began by analyzing the evidence and the law pertaining to the records before him and found that indeed the appellant is time barred in claiming the land after the passage of 12 years as prescribed by law. Having found that, he disagreed with both assessors on the reason of time limitation and dismissed the appeal with costs.

Verily, the issue of time limitation is paramount as it touches the jurisdiction of the matter and in most scenario it supersedes other contested issues. I would therefore not say that the appellate Tribunal did not consider the assessors' opinion but rather it considered the same and could not agree with them as for the reasons of time limitation. Therefore, this ground of appeal has no merits and it flops.

The second ground of appeal is on none-joinder of parties. With respect, this issue was neither raised at the first appellate Tribunal nor dealt with at the trial Tribunal. It is the principle of law that an

appellate court cannot allow matters not taken or pleaded in the court below to be raised on appeal. This position has been enunciated by the Court of Appeal of Tanzania in a number of decisions including; **Hotel Traverline Ltd and 2 Others vs NBC** [2006] TLR 133, and **James Funke Gwahilo vs A.G** [2004] TLR 168. The issue of non joinder of parties therefore is an afterthought.

More-so, just for argument sake, the non-joinder or mis-joinder of parties cannot be an impediment of defeating a suit so long as the court manages to deal with the matter in controversy and interest of parties. In this case, I see no such party that has not been joined that would warrant the court to declare a non-joinder. This ground of appeal is also unmeritorious.

The third ground of appeal is in essence on the evaluation of evidence and weight attached to it.

As records would reveal this is the second appeal. It is trite law that the second appellate court is discouraged from interfering with the concurrent findings of facts by the two lower courts except in rare occasions where it is shown that there has been a misapprehension of

the evidence or misdirection causing a miscarriage of justice - **Nchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2017 CAT at Mwanza, (unreported); **Musa Hassani v. Barnabas Yohanna Shedafa (Legal Representative of the late Yohana Shedafa)** Civil Appeal No. 101 of 2018 CAT at Tanga (unreported); and **Amratlal Damodar and Another v. H. Lariwalla [1980] TLR. 31**. In **Amratlal Damodar** for instance, it was held that:

"Where there are concurrent findings of fact by two courts/ the Court of Appeal, as a wise rule of practice/ should not disturb them unless it is clearly shown that there has been misapprehension of evidence/ a miscarriage of justice or violation of some principle of law or procedure."

From the position of the law above, it is my considered view that the second appellate court will only interfere with findings of fact of lower courts in situations where a 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 in evaluation of the evidence.

Evidently, the disputed land is un-surveyed land. Therefore, cogent proof on the ownership, possession and/or occupation is paramount on a party that claims ownership.

Both lower courts have considered the issue of time limitation against the appellant in claiming the disputed land. Rightly so, in my firm stance.

According to the appellant's testimony, the respondent has been using the disputed land for more than 15 years. She did not say that they licenced or invited her. All she said was that they had a big land which they sold some of the portions and that Mzee Eightson who is said to have sold the land to the respondent invaded their land.

Mzee Eightson (SU2) declared the appellant as invaders and that he is not bordering with the appellant. Also that it was him who sold his land to the respondent who has been using it for a long time. **SU3, Geoffrey Elias Lugara**, told the court that since 2010 he has been seeing the respondent using the disputed land and that the appellant had sold their land. **SU4, Eliudi Fasy Mbala** said he saw Mzee Mwakasitu developing the land and cultivating it since year 2005 and he has never seen the appellant for all that time.

The evidence above clearly shows that for all those years (more than 15 years as admitted by the appellant), the respondent has been in

occupation and peaceful use of the disputed premises. The appellant has not told this court that probably she was not around when the respondent was doing all the developments in the said land. All in all, the evidence in record reveal that it was the respondent who was in possession of the land.

I am intrigued to borrow a leaf from the rule of the law of evidence under **Section 119 of the Evidence Act, Cap 6, RE 2022** that:

"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who assert that he is not the owner"

Reading the above position of the law together with **item 6 of the Schedule to The Magistrates' Courts (Limitation of Proceedings Under Customary Law) Rules, GN. No 311 of 1964** which provides for time limitation on proceedings to recover possession of land to be 12 years; it is obvious here that since the appellant claimed the land is his property whilst the respondent was in possession and claimed long use and ownership; the appellant had a duty to avail concrete proof that the disputed land is still hers. The mere assertion that it used to be theirs while there is proof that they sold their land and another proof

that the land was the property of SU2 who then sold to the respondent, is not enough as the burden of proof is on her.

On the other hand, it would be contrary to the principle of the law to deprive the respondent of her right over the suit land which he possessed undisturbed over her long period of occupation. I fortify my stance by the decision held in the case of **Shabani Nassoro V Rajabu Simba** [1967] HCD 233 where the respondent has been in possession of a disputed land for 18 years, and the court observed that:

"The court has been reluctant to disturb persons who have occupied land and developed it over a long period. The respondent and his father have been in occupation of the land for a minimum of 18 years, which is quite a long time. It would be unfair to disturb their occupation...."

Again in another case of **Balikuliye Mpunagi V Nzwili Mashengu** [1968] HCD 20, Cross, J (as he then was) said the following:

"Both customary law and equity favour the defendant's claim to be entitled to possession of the shamba"

From the above observations, I join hands with the two lower Tribunals in seeing that the appellant's claim of land has not only been succumbed by a web of time limitation; but she has also failed to

accomplish her legal duty which requires any person who desires the court to give her legal right on the existence of facts which he asserts, must prove the existence of those facts. I find the respondent's evidence was more persuasive and stronger to her occupation, possession and ownership of the disputed land than the appellant.

All said and done, I find the appeal to be unmeritorious and dismiss it with costs.

Accordingly ordered.



Mbeya
02.12.2022

A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim
Judge