IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

LAND APPEAL NO. 49 OF 2021

(Arising from the decision of District Land Application No. 06 of 2019 before Chato District Land and Housing Tribunal)

TEGEMEO PAULO .....APPELLANT

VERSUS

NYARUKONGOGO VILLAGE COUNCIL ..... RESPONDENT

JUDGMENT

23rd March & 9th May, 2022

Kahyoza, J.

Tegemeo appeals against a decision of the District Land and Housing Tribunal (the DLHT) dismissing his claim for eight (8) acres of land for want of evidence. **Tegemeo** raised nine grounds of complaints against the decision of the DLHT in favour of **Nyarukongogo Village Council** (**the village**).

Tegemeo and the village filed written submissions to support and to oppose the appeal respectively. Tegemeo dropped the fifth and sixth grounds of appeal while submitting in support of the appeal. He maintained

seven grounds of appeal. He argued the first and second separately and argued the remaining ground of appeal jointly.

Did Tegemeo procure 8 acres of land?

Tegemeo complained in the first ground of appeal that the DLHT failure to consider the fact the appellant purchased the land in 1998 and he had been in possession of the disputed land for a period of more than 12 years undisturbed. Tegemeo submitted that a person who has been in possession of the suit land for more than 12 years is protected by the doctrine of adverse possession.

The village replied that the principle of adverse possession does not apply as Tegemeo did not show his desire to rely on the principle of adverse possession. To support her position, the village referred this court to the case of **Bhoke Kitang'ita v. Makuru Mahemba**, Civil Appeal No. 222 of 2017.

I will commence with the issue whether Tegemeo procure 8 acres of land. Tegemeo argued that he bought 8 acres from Baltazal Ishengelo at Tzs. 60,000/=. According to Tegemeo's evidence, Baltazal Ishengelo's wife and two children witnessed the sale. Baltazal Ishengelo's children who

witnessed the sale included Apolinary Baltazari Ishengelo (**Pw2**) who testified in support of Tegemeo's evidence that Baltazal Ishengelo, his father, sold 8 acres of land to Tegemeo in 1998. There were other witnesses who testified in favour of Tegemeo.

The village summoned a several witnesses including Baltazal Ishengelo's son, Nyarukongogo. Nyarukongogo (**Dw3**) is the elder brother of Apolinary Baltazari Ishengelo (**Pw2**). He supported the contention that Tegemeo bought land from his father, Baltazal Ishengelo. He deposed that it was not more than one acre. Nyarukongogo (**Dw3**) added that he pointed the boundaries of the sold land to Tegemeo. He contended that Tegemeo took advantage of Apolinary Baltazari Ishengelo (**Pw2**)'s drunkardness to bribe him to testify in his favour. He strongly denied that his father sold the village hill.

The DLHT found that Tegemeo bought land from Baltazal Ishengelo. However, he failed to prove that he bought 8 acres. It stated that while Tegemeo deposed that he bought 8 acres of land the sale agreement produced as exhibit was silent on the issue of the acreage of land he purchased. I examined the sale agreement and found that it is true that the agreement did not state the acreage sold to Tegemeo. It reads-

"Ndugu Barthazary Ishengero, Anauza ardhi tupu kwa ndugu Tegemeo Paulo Kabuku. Ardhi hiyo haina zao lolote wala mmea wowo wa kupanda. Ardhi hiyo inaanzia chini kwenda juu mlimani, upande wakushoto inapakana na ndugu Alfred Lwangote na upande wa kulia inapakana na ndugu Daudi Lukuba. Upande wa chini inapakana na Ndugu Barthazary Ishengero. Upande wa juu haipakani na mtu yeyote...."

I totally agree with the DLHT's conclusion that Tegemeo did not produce evidence to prove that he bought 8 acres of land. The sale agreement was silent. It is the position of the law **where an agreement is in writing, no oral evidence**, may be given by the parties to the agreement or their representatives, in a civil case, to contradict or vary the written terms. Thus, the evidence of Tegemeo and his witnesses especially, Apolinary Baltazari Ishengelo (**Pw2**) that he purchased 8 acres of land cannot vary or add to the written terms of the sale agreement. The sale agreement is silent on the acreage of land Tegemeo purchased. I find the evidence of Nyarukongogo (**Dw3**) more credible. I wish to rely on section 101 of the Law of Evidence Act, [Cap. 6 R.E. 2019] that no evidence is required to prove or vary add to the terms of a written contract. It stipulates that-

101. When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100, ***no evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms:***

Provided that-

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved and in considering whether or not this paragraph of this provision applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property, may be proved;

d) the existence of any distinct subsequent oral agreement to rescind or modify the contract, grant or disposition of property may be proved, except in cases in which the contract, grant or disposition of property is by law required to be in writing or has

been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

Tegemeo deposed that he was entitled to 8 acres of land as he occupied the land undisturbed for more than 12 years. He stated that he occupied the land for 21 years undisturbed by the village. I agree with Tegemeo that if a person occupies land undisturbed for a period of more than 12 years the law must protect such a person.

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. The Court of Appeal discussed circumstances under which a person seeking to acquire title to land under that principle 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, (Unreported). However, there are exceptions to that general rule, one of them is that a person cannot maintain a claim of adverse possession against the government or public land. See section 38 of the **Law of Limitation Act,** [Cap. 89 R.E. 2019] which stipulates that no person shall acquire public land by adverse possession. It reads that-

> *38 (1) Notwithstanding anything contained in this Act-*
>
> > *(a)* ***no person shall become entitled to an estate or interest in any public land by adverse possession;*** *(Emphasis added)*

Section 2 of the Law of Limitation Act, defines the public land as follows-

> *"public land" means any land which is not held, or deemed by the provisions of the Government Leaseholds (Conversion to Rights of Occupancy) Act to be held, under a right of occupancy, or under customary law, or under the provisions of section 5 of the Customary Leaseholds (Enfranchisement) Act;*

The disputed land is a public land as Tegemeo does not claim to occupy it under customary law. Tegemeo asserted that he bought the land

from Baltazal Ishengelo, in the alternative he contended that claim he acquired it by adverse possession. I did not find evidence proving when Tegemeo invaded the village land. Tegemeo asserted that he occupied the village land for 21 years may be counting from the period he procured land from Balthazar. He certainly occupied the land he bought for 21 years but not the village land. There is evidence that the villagers used the disputed land for pastures and digging stones. Even if, Tegemeo's claim is true that he occupied the disputed land for 21 years undisturbed, that would not give him right to claim ownership or title to the land, as no one can acquire public land by adverse possession. I find support in section 38 of the **Law of Limitation Act** and a Kenyan case of **Peter Mwashi & Anor -vs- Javan Mwashi & Others, Eldoret HCC 38 OF 2004** and **Beatrice Syokau -vs- Kenya Airports Authority & Another Petition No 1 of 2012,** where it was held to the effect one cannot maintain a claim for government or public land by way of adverse possession.

I find the first ground of appeal that DLHT for its failure to hold that Tegemeo procured 8 acres of land from Balthazar or acquired it by adverse possession is meritless. I dismiss it.

Does extension of time for a period more than 14 days to file the written statement of defence occasion miscarriage of justice?

Tegemeo complained in the second ground of appeal that the DLHT erred to extend time to file the written statement of defence more than 14 days without a formal application. He submitted that on 19.6. 2019 the village obtained leave to file the written statement of defence, which the village filed on 19.7.2019. He contended that the DLHT violated the law to extend time within which the village to file the written statement of defence. To support his position, he cited regulation 7(3) of the **Land Disputes Courts (District Land and Housing Tribunal) Regulations**, G.N. No. 173/2003 (the **Regulations**) which stipulates that-

> *"7(3) The Chairman may, on good cause being shown by any party to the proceedings extend time within which to file the written statement of defence or counter claim as the case may be, except that in any case such extension shall not exceed; -*
>
> *(a) 14 days in case of filing the written statement of defence."*

Tegemeo submitted that the law was coached in the mandatory terms so the DLHT erred to accept and act upon the written statement of defence filed in contravention of the law. He argued that the irregularity prejudiced him.

The village beseeched this Court to apply the principle of overriding objective by concentrating on the substantive justice.

In his rejoinder, Tegemeo averred that the overriding objective cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case.

I examined the record and found that the village was served through Mr. Fares Jeremia on the 30. 4. 2019. He was required to appear with his defence within 21 days. The DLHT fixed the date for appearance on the 10th June, 2019. The summons reads "*Unatakiwa kuhudhuria mbele ya baraza siku hiyo bila kukosa pamoja na utetezi /majibu yako ndani ya siku 14.*" The village representative did not appear on 10.6.2019. He appeared on 29.6.2019 with the defence. The DLHT allowed the village to file written statement of defence. After the DLHT allowed the village to file the defence, Tegemeo raised the objection that the written statement of defence was filed out of time. After hearing the village, the DLHT maintained her position of allowing the village to file the written statement of defence. Indeed, there is a procedural irregularity. However, the irregularity did not occasion a failure of justice. Form 2B, which was served to the village is summons to appear. It does not contain a

requirement to file the defence. The requirement to file the written statement of defence is an improvisation. It was added to the original, which part of the Regulations. I do not find it just to punish a party for violating something invented by the DLHT. As the record bears testimony, DLHT did not order the village to file the written statement of defence prior to 29.6.2019.

In addition, the record depicts that the village filed the written statement of defence on 29.6.2019 and not on 29.7.2019 as stated by the Tegemeo. There is no ground to fault the DLHT for accepting and acting on the village's written statement of defence. Even if, to accept and act on the written statement of defence filed after the DLHT extended time for than 14 days, is an irregularity, it did not occasion miscarriage of justice. Tegemeo submitted without explaining that the irregularity prejudiced him. He did not convince me. Section 45 of the **Land Disputes Courts Act**, [Cap. 216 RE 2019] prohibits the appellate court to reverse the decision of the DLHT on account of irregularity unless it occasioned injustice. It states that-

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision*

on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has ***in fact occasioned a failure of justice.***"

The irregularity referred to did not occasion miscarriage of justice so the complaint in the second ground of appeal is meritless, I dismiss it.

Is Tegemeo's evidence heavier than that of the village?

Tegemeo argued the third, fourth, fifth, seventh, eight and night grounds of appeal jointly. Briefly, Tegemeo submitted in support of the grounds of appeal that the decision of the DLHT was against the weight of the evidence on record. He submitted at length how he tendered enough evidence to prove that he occupied 8 acres of land.

The village replied that Tegemeo bore the burden to prove the allegation that he bought 8 acres of land. The village relied on section 110 of the Evidence Act. The village argued that Tegemeo did not convince the DLHT that he bought 8 acres from Baltazal Ishengelo.

Tegemeo relies on the documentary evidence Exh.P. 2 and Exh.P. 3, which were letters showing that he secured a loan using an eight-acre

land. On the letters forming part of Exh.P.3 showed the loan was secured by a farm of trees. It did not disclose the size of the farm. Even if, it disclosed the size of the firm it could not have been the evidence to prove Tegemeo's title to the disputed land. Title to the disputed land, in circumstance of this case, may only be proved by the sale agreement. Tegemeo's claim for the disputed land is that he purchased it from Baltazal Ishengelo. For that reason, Tegemeo traces his title from the sale agreement and not from a loan agreement.

The document, which mentioned the size of the land is Tegemeo's application for a loan. Tegemeo's application for a loan was part of Exh.P. 3. Tegemeo asserted in his application for a loan that his tree farm was 8 acres. I am unable to rely on that piece of evidence to find that Tegemeo proved that he has a title to the suit land of 8 acres.

It is clear from above that the decisive evidence in this case is the sale agreement. I considered the evidence as to whether Tegemeo proved that he bought eight acres and concluded that there was no such evidence. I considered the sale agreement, the evidence of Tegemeo (**Pw1**), Apolinary Baltazari Ishengelo (**Pw2**) and Nyarukongogo (**Dw3**) and concluded that Tegemeo did not establish his claim. I will not repeat my

reasoning. I will simply associate myself with the findings in respect of the first ground of appeal. I am of the firm view that Tegemeo failed to tender sufficient evidence to the required standard, that he bought eight acres of land. I, thus, dismiss the third, fourth, fifth, seventh, eight and night grounds of appeal for want of merit.

In the upshot, I find the appeal without merit. I dismiss it entirely with costs. I uphold the decision of the district land and housing tribunal.

I order accordingly.

J. R. Kahyoza

JUDGE

9/5/2022

Court: Judgment delivered in the presence of Ms. Zainabu Kassim, State Attorney from Biharamuro District Council for the respondent and in the absence of the appellant. B/C Ms. Jackline present.

THE HIGH COURT OF TANZANIA MWANZA

J. R. Kahyoza

JUDGE