THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAA,)

AT DAR ES SALAAM

LAND APPEAL NO. 136 OF 2021

(Arising from the Judgement of Land Dispute No. 4 of 2017 for Kilombero/Ulanga District for Ifakara, originating from Mtimbira Ward Tribunal in Land Dispute No. 59 of 2017)

HUSSEIN TALOO..... APPELLANT

VERSUS

KANDEGE MENLANDI KANDEGE .....RESPONDENT

JUGDEMENT

Final written submission date on: 22/04/2022

Judgement date on: 13/05/2022

NGWEMBE, J:

This is an appeal which has dual purpose, first the appellant has raised three important grounds which goes to the root of justice, however those grounds in essence challenges the decision of the Ward Tribunal for Mtimbira; second those grounds, none of them were among the grounds decided by the first appellate Tribunal, that is, District Land and Housing Tribunal. The legal question is whether the second appellate court may determine issues which were not raised and determined by the first appellate court/tribunal? The answer to this question will be provided in due course of this judgement.

It is important to print out a clear picture on this appeal by narrating its genesis. Originally, the respondent Kandege Mendradi Kandege is a grandchild of Severini Kandege Likonga who died in year 1976. Since demise of Severini, the original owner of the suit Land to some times in year 2017, both parties were harmoniously living together. However, on 14th May, 2015 the Respondent managed to obtain letters of administration over the estate of the original owner Severin Kandege Likonga. Tensions between the two parties fueled in year 2017, which ended in the Ward Tribunal for Mtimbira. The claimant was Kandege Mendradi Kandege against Hussein Tallo. The claim was in respect to trespass (Uvamizi) to his land.

The Ward Tribunal, upon hearing both parties, decided that the suit land measuring 10 X *22 X 25 X 38 meters* are properties of the claimant Kandege Menladi Kandege because his grandfather occupied and lived therein. Thus, such land was founded by his grandfather who died in year 1976.

Following such decision, Hussein Taloo appealed to the District Land and Housing Tribunal for Kilombero/Ulanga at Ifakara, grounded with ten grievances. Those grievances did not touch on propriate and quorum of the Ward Tribunal as per the present Memorandum of Appeal. However, the District Land Tribunal in its one and a half pages of judgement, upheld the decision of the ward tribunal, hence this appeal. The grounds preferred by the appellant herein are quoted hereunder:-

1. *That, the trial tribunal erred in law by determining the dispute with improper quorum of members, to*

wit the two members who delivered the decision at the ward tribunal did not take part during trial

2. *That, the trial tribunal erred in law by issuing judgement which fall short of signature of one member who purported to have decided the dispute; and*
3. *That, the trial tribunal erred in law by disregarding the claims of the appellant that respondent did not have cause of action in terms of time because the respondent herein was a complainant at the trial tribunal claiming ownership of the suit land in his capacity as administrator of the deceased estate, armed with letter of administration of deceased estate, got in year 2015 equal to 43 years of death of deceased in year 1976 contrary to law.*

These grounds are not emanating from the judgement of the appellate Tribunal, rather are purely based on the decision of the ward Tribunal. The question is, whether this court may determine an appeal based on grounds which were not determined by the first appellate court/Tribunal? The answer is irregular to do so unless it is purely based on points of law. Always, the second appellate court is mandated to determine grounds of appeal based on the decision of the first appellate court. If the grounds were not raised at the first appellate court/Tribunal same cannot be raised at the second appeal. That is a known legal position and the court rarely revisits material facts adduced during trial and may rarely depart from the two concurrent decisions on material facts.

However, upon serious perusal to the judgement of one and a half page of the first appellate Tribunal, and upon considering the ten grounds of appeal before it, I find prudent, just and equitable to revisit the whole matter and decide accordingly.

According to the evidence adduced during trial at the Ward Tribunal, the respondent who was the complainant, testified that, he is the administrator of his grandfather who died in year 1976. Further, testified that, his grandfather had three children, one of them was still alive. Thus, as an administrator, had every duty to claim such land from the appellant for same was founded by his grandfather.

In turn the evidences of the appellant were clear that the suit land was granted to him by the Village Council way back to 1974, since then he occupied it peacefully and built his family house, living therein to date. From 1974 to 2017 has been occupying such piece of land equivalent to 43 years. Rested testifying that the application was unfounded, intended to cause unnecessary troubles.

From those facts, there are certain issues which must be considered and decided. One of them is when the appellant started occupying the suit land? When the alleged original owner died? Whether he left any children behind? What were they doing upon finding their land is occupied and utilized by the appellant? To answer these questions, it is on record that the alleged original owner died in year 1976. At the same time, the respondent when was asked by the members of Ward Tribunal admitted that the deceased left four children and one of them was still alive in year 2015, when he was appointed an administrator. Those facts when considered together with the

undisputed fact that the appellant was granted by the Village council in year 1974, since then to 2017 which fact was not disputed or contested.

It goes like a brightest day light, that the original owner Severin Kandege Likonga was alive and kicking when the appellant was granted ownership by the village council in year 1974 two consecutive years he witnessed the Appellant enjoying occupation of the suit land. It means he was happy and friendly to the appellant.

Moreover, the children of the alleged original owner (Severin Kandege Likonga) never had any quarrel with the appellant from the time their father died in year 1976 to date, save the grandchild Kandege Menladi Kandege in year 2017, which was equal to 43 years in full occupation of the suit land by the appellant.

I have visited some old precedents to guide me in deciding this appeal. In perusing those precedents, the doctrine of adverse possession has been applied in many cases of similar nature. The ingredients building the doctrine of adverse possession was detailed in the case of **Registered Trustee of Holy Spirit Sisters Tanzania Vs. January Kamili Shayo and 136 others, Civil Appeal No. 193 of 2016, (CAT at Arusha).** The Court listed the following ingredients: -

1. *That they had been absence of possession by the true owner through abandonment,*
2. *That the adverse possession had been in actual possession of the peace of land.*

3. *That the adverse possession had no colour of right to be there other than his entry and occupation.*
4. *That the adverse possession had openly and without the consent of the true owner done act which were inconsistent with the enjoyment by the true owner of the land for purpose for which he intends to use it.*
5. *That there was sufficient animus to dispose and an animus possidendi*
6. *That the statutory period, in this case twelve years, had lapsed;*
7. *That there had been no interruption to the adverse possession throughout the foresaid statutory period; and*
8. *That the nature of the property was such that, in the light of the foregoing, adverse possession would result.*

The same reasoning was repeated in the cases of **Hamisi Mghenyi Vs. Yusufu Juma, Land Appeal No. 61 of 2008, High Court of Tanzania at Dodoma (Unreported)** and **Samson Mwambene Vs. Edson Mwanjigili (2001) TLR 1.**

I am also aware that, the doctrine of adverse possession does not apply to an invitee to the land even if he may stay therein for a century or more. In respect to this appeal, the appellant was not an invitee by whoever, rather was granted permanent ownership by the Village Council. It means the doctrine of adverse possession apply squirrely in this appeal.

To the best of my understanding, this ground alone, is capable of disposing off the whole appeal and without laboring much on other grounds, same cannot change the already arrived conclusion.

Therefore, I proceed to grant the appeal, quash the proceedings and judgements of both Tribunals, that is, District Tribunal and Ward Tribunal as null and void abinitio based on the doctrine of adverse possession. I proceed to order the appellant a lawful owner of the suit land. Each party to carry his own costs.

I accordingly Order.

Dated at Dar es Salaam this 13th day of May, 2022

P.J. NGWEMBE

JUDGE

13/05/2022

Court: Delivered in Chambers on this 13th day of May, 2022 in the presence of the respondent and in the absence of the appellant.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

13/05/2022