

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

LAND APPEAL NO. 45 OF 2022

(Originating from Application No. 20 of 2017 from the District Land and Housing Tribunal at Geita)

MICHAEL LUTANDULA.....APPELLANT

VERSUS

DEOGRATIAS FIDELIS.....RESPONDENT

JUDGMENT

15th & 17th February 2023

Kilekamajenga, J.

This is the second time the parties are approaching this Honourable Court for justice. Back in 2008, the respondent commenced a suit against the appellant in Nyamatongo Ward Tribunal. The case reached this court in 2014 and it was dismissed in 2015 by nullifying the proceedings and decision on the reason that the respondent was not vested with locus stand to sue for the land that belonged to his father. The respondent went back to the Primary Court to seek an order to allow him to administer the estates of his father. He was so appointed and immediately filed the instant appeal in 2017.

The parties are contesting over ownership of a piece of land located at Lwabi Hamlet in Nyamatongo Village within Sengerema District. During the trial, the



respondent testified that, he is a teacher working at Mecco in Mwanza and that the land in dispute belonged to his father who died in 2007 at Nyamatongo Village. He was appointed the administrator of estate vide Probate and Administration Cause No. 03 of 2016. He further informed the trial tribunal that, the appellant used to hire half an acre from his father from 2001 until in 2007 when his father died. The appellant used to pay some crops as price for the hire. In 2008, they tried to stop the appellant from using the land and the dispute ensued. According to the respondent, the land in dispute measures about eight and half acres. The respondent summoned his mother to support the testimony. The respondent's mother (DW2) informed the court that they were allocated the land in 1960 by Mapinge Malando who was a chief of that area. She further insisted that, the appellant used to lease the land from her husband from 2001 until in 2007. She stopped the appellant from using the land and the dispute arose. The land measuring eight and half an acres is being contested in this case.

When defending the land in dispute, the appellant stated that, in 1995, he purchased an approximately two and an half acres from the respondent's father called Fidelis Mazula. He paid Tshs. 25,000/= and a heifer as a purchase price of the land. Thereafter, the sale agreement was approved by the village

administrative authorities. By that time, the land was uncultivated and covered with a forest; he continued to use it until the dispute arose. He further confirmed that, even after he purchased the two and half acres, the respondent's father remained with a bigger land in his possession. The appellant's evidence was supported by Jeremiah Magonji who confirmed that the appellant bought a piece of land from the respondent's father back in 1995. The appellant paid Tshs. 25,000/= and one cow as a purchase price. The village leaders led by the chairman called Tibendela visited the land to confirm the boundaries. Thereafter, the sale agreement was chronicled in the presence of village leaders and DW2 was the hamlet leader at that time. The appellant continued to use the land until the dispute arose. DW2 vehemently refuted the allegation that, the appellant was hiring the land from the respondent's father.

At the end, the case was decided in favour of the respondent and the appellant approached this court with eight grounds thus:

- 1. That, the trial tribunal erred in law and in fact by ruling in favour of the respondent while the required standard of proof wasn't met and in contravention to the doctrine of equity.*
- 2. That, the trial tribunal erred in law and fact by giving much weight on the mere verbal anticipations/allegations that there were lease agreement*

between the appellant and respondent's father contrary to the facts in finding and requirement of the law.

- 3. That, the trial tribunal erred in law and in fact in entertaining and ruling against the appellant over the dispute which had no jurisdiction to and the same was erroneously/illegally placed over it.*
- 4. That, the trial tribunal erred in law and in fact by declaring the respondent a lawful owner in forgetful/disregarding adverse possession dogma apparently depicted in trial proceedings.*
- 5. That, the trial tribunal erred in law and in fact by entertaining the dispute which was hopelessly time barred.*
- 6. That, the trial tribunal erred in law and in fact by entertaining a matter which is res judicata.*
- 7. That, the trial tribunal erred in law and fact by failure to evaluate on the pleading impleaded under which capacity the respondent (the applicant on the trial court) was litigating for on the claimed deceased's property, hence erroneously ruled in favour of the respondent.*
- 8. That, the trial tribunal erred in law and fact by entertaining the dispute on an application which does not fully describe the suit property and source of information contrary to Order VI Rule 15 and VIII Rule 3 of the Civil Procedure Code, Cap. 33 RE 2019.*

When invited to argue the appeal, the appellant, who was present, was also represented by the learned advocate, Mr. Gibson Ishengoma whereas the respondent enjoyed the legal services of the learned advocate, Mr. Nestory Joseph Lutambi. On the first ground, the counsel for the appellant believed that,

the respondent had no clean hands to sue for the land. The fact that, the respondent was appointed the administrator of his father did not give him ownership of the land. He further argued that, under section 64(1)(a) of the Land Act, the alleged lease agreement ought to be in writing but the trial proceedings do not show whether the lease agreement was in writing. The counsel cemented his argument with the case of **Registered Trustees of Cornelius Christian Aid to Churches and the Needy foundation v. Equity Bank (Tanzania) Limited**, Land Case No. 241 of 2022 (unreported).

When submitting on the second ground, the counsel argued that, the trial tribunal had no jurisdiction to try this case because it was previously decided by Honourable Judge Gwae. Initially, this case commenced before Nyamatongo Ward Tribunal but it was dismissed on technical grounds before this court. According to the counsel, it was inappropriate for the respondent to file this case again in the District Land and Housing Tribunal. He dropped the fourth ground and proceeded to submit on the fifth ground that, this case was hopelessly time-barred because the dispute arose in 2001. Therefore, the period of 12 years had lapsed as per the Law of Limitation Act. On the sixth ground, Mr. Ishengoma reiterated further that this case was determined vide Land Appeal No. 160 of

2014. He referred the court to the case of **Onesmo Olugurumwa v. Hon. Attorney General**, Misc. Civil Cause No. 36 of 2019.

On the eighth ground, the counsel informed the court that the suit land was not fully described in the application as the law requires. In his view, failure to describe the land in dispute is against the law as it was stated in the case of **Fatuma Shabani Said Dololo and another v. Abdallah Said Mgaza and Another**, Land Case No. 138 of 2020, HC at Dar es salaam. On the seventh ground it was the counsel's submission that, the respondent sued as an administrator of the estate but that fact is not depicted in the records of the trial tribunal. Such an error is fatal as it was stated in the case of **Suzan Waryoba v. Shija Dalawa**, Civil Appeal No. 44 of 2017. The counsel finally prayed for the dismissal of the appeal.

In reply, the counsel for the respondent objected the appeal alleging that the grounds have no merit. When responding on the first ground, the counsel submitted that, the land belongs to the respondent's father and that there is no evidence required to prove where the respondent's father got the land. Also, it was the appellant's duty to prove when the land shifted from the respondent's father to him. Furthermore, the appellant failed to prove the existence of the

alleged lease agreement and that, the provision of the Land Act cited by the counsel for the appellant does not apply in the village land.

On the third ground, the counsel insisted that, the trial tribunal had jurisdiction to try the case because the value of the land may be challenged by presentation of the valuation report and not otherwise. On the fifth ground, the counsel believed that, the case was filed within time as the period of twelve years have not lapsed since the cause of action arose. In this case, the cause of action arose in 2007.

On the sixth ground, the counsel argued that, case was not *res judicata* because it was not determined on its finality but the proceedings and decision were nullified. When responding on the eighth ground, the counsel objected the allegation that the land in dispute was not clearly described. However, on the seventh ground, the counsel conceded that, the title of the case does not specify whether the respondent sued as the administrator of estate. Such an error, nonetheless, is curable by invoking the overriding objective. He referred the court to the case of **Magambazi Mines Company Limited v. Kidee Mining (T) Limited**, Civil Appeal No. 238 of 2019, CAT at Arusha (unreported). He finally urged the court to dismiss the appeal.

When rejoining, the counsel for the appellant assailed the respondent for failing to prove the case on the balance of probability. When the appellant bought the land, the ownership shifted to him. He further stressed that, the dispute arose in 2001 and it is therefore time barred. Also, the description of the land suggests as if it is the only land located at Nyamatongo. He further objected the application of the overriding objective in this case arguing that, the doctrine is not a panacea.

Having considered the competing submissions from the two learned counsel, this court is now moved to address the grounds of appeal as advanced by the appellant. On the first ground, the appellant argued that the case was not proved to the required standard and also contravened the doctrine of equity. In his oral submission, Mr. Ishengoma for the appellant argued that, the respondent had no clean hands to sue for the land because he was not the owner. On the other hand, the counsel for respondent insisted that, the land belonged to the respondent's father and the respondent was suing as an administrator of the estates of his father. I should first recap further that, when this dispute reached this court vide Land Appeal No. 160 of 2014, it was dismissed on the mere reason that the respondent was not suing as the

administrator of the estate. By that time, the dispute originated from Nyamatongo Ward Tribunal. After the dismissal of the case before Honourable Judge Gwae, the respondent went back and sought an order to allow him administer the estate of his father. He was granted and went to file the instant case in the District Land and Housing Tribunal. The judgment of the trial tribunal clearly shows that the respondent was suing as the administrator and not as the owner of the land. In my view, the counsel for the appellant was not justified to argue that the respondent had no clean hands to sue for the land as he was not the owner of the land.

Furthermore, the counsel argued that, the title does not show whether the respondent was suing as the administrator of the estate. I understand, under the principle stated in the case of **Suzan Waryoba** (*supra*), the Court of Appeal decided among other things that:

"We only wish to accentuate that when a litigant sues as an administrator or administratrix of estate, it is desirable that the same should be reflected in the title."

However, the trial tribunal's decision which is in Swahili clearly chronicles the following information:

"Maombi haya yameletwa mbele ya baraza hili na mleta maombi ambaye anatambulika mbele ya baraza hili kama Msimamizi wa Mirathi ya baba yake FIDELIUS MAZULA (marehemu toka 2007) kupitia 'fomu nama IV pamoja na hukumu ya shauri la mirathi No. 03/2016 anayetambulika kama kielelezo P1.'"

Back to the case at hand, I appreciate the direction given by the Court of Appeal on indicating the status of the litigant on the title. I however, subscribe to the argument given by the counsel for the respondent that, such an error may not have occasioned injustice as long as the decision of the trial tribunal identifies the respondent as the administrator of estate and not as the owner.

Furthermore, on the same ground, the counsel for the appellant argued that, the respondent did not prove the case on the balance of probability. The pair of evidence has two opposite directions; the appellant's evidence suggests that he purchased two and half acres from the respondent's father in 1995. He continued to use the land until in 2007 when the respondent's father passed on. In other words, the death of the respondent's father prompted the instant dispute. His evidence was supported with one of the village leaders who witnessed the sale agreement. On the other hand, the respondent's evidence never objected on the fact that, the appellant was using the land for some years.

In his evidence, the respondent alleged that, the appellant was only hiring the land but never purchased it. The respondent's evidence was supported by his mother. On the mere balance of probability, there is greater chance that, the appellant purchased the land and continued to use it. The respondent who was young in 1995 might have not been involved in the sale of the land. The appellant could not have been in the continued use of the land for such a long time until the death of the respondent's father if he had not purchased it. I entirely agree with the counsel for the appellant that, the respondent failed to disprove, on the balance of probability that, the appellant purchased the land in dispute. The appellant was content in his testimony that he purchased only a piece of two and half acres (by estimation) and he was not claiming for the whole remaining land of the respondent's father. On this ground alone I allow the appeal.

Before penning down, I wish also to address some of the key issues raised by the appellant albeit in brief. On the fifth ground, the counsel for the appellant raised the issue of time limitation. In his view, the suit was time barred because the cause of action arose in 2001. The counsel objected this point arguing that, the dispute arose in 2007 and not in 2001 as alleged by the counsel for the

appellant. I have already indicated that the dispute arose in 2007 when the respondent stopped the appellant from the using the land. The respondent took this dispute to Nyamatongo Ward Tribunal in 2008. An appeal was preferred to the District Land and Housing Tribunal in 2009 and finally reached this court in 2014. As already stated, the initial appeal before this court led to the nullification of the proceedings and decision thereof. Therefore, the case was not time barred. Also, the parties went back to initiate a fresh suit. This time, the respondent filed the case in the District Land and Housing Tribunal as the land in dispute seemed to be more than eight acres and therefore exceeded the pecuniary jurisdiction of the Ward Tribunal. See, **section 15 of the Land Disputes Courts Act, Cap. 216, Cap. 2019**. It was proper for the dispute to be filed in the District Land and Housing Tribunal.

On the sixth ground, the counsel for the appellant argued that the matter was *res judicata*. He referred the court to the previous decision of this case about the same parties and on the same cause of action. The counsel for the respondent objected this ground arguing that, the previous decision of this court did not substantially determine the case. I subscribe to the argument advanced by the counsel for the respondent that, Land Appeal No. 160 of 2014 nullified the proceedings and decision about this case. The parties went back to institute the

case after complying with the requirement of seeking appointment to administer the estate. In terms of **section 9 of the Civil Procedure Code, Cap. 33 RE 2019**, the instant case is not *res judicata* because it was not determined to its finality.

The eighth ground questions the way the land in dispute was described. According to the counsel for the appellant, the description of the suit property was in violation of the law. This ground prompted my perusal of the application lodged in the trial tribunal. On the location and address of the suit land, the respondent described the land as eight and half acres located at Lwabi Hamlet at Nyamatongo village within Sengerema District. In my view, the description of the land such as this, which is unsurveyed and situated in a village, its description in the application exhausted all the relevant information. The respondent complied with the law and there is nothing to fault the decision of the trial tribunal based on the description of the suit land.

In conclusion, the evidence at hand clearly suggests that the appellant bought two and half acres of land from the respondent's father in 1995. He used the land without interruptions until the respondent's father died in 2007. The appellant could not have used the same land for such a long time if he was

merely a leasee. The respondent, who was young at that time, might have not known this fact and he illegally stepped in to stop the appellant from enjoying his rights over the land. I find the appellant's appeal has merit especially on the first ground. I entirely agree with the appellant's argument that, the respondent failed to prove his allegation. To the contrary, the appellant established his case, at least, on preponderance of probability that he purchased the land. I hereby allow the appeal and reverse the decision of the trial tribunal. I further declare that, the appellant is the lawful owner of the piece of land measuring two and half acres that he bought from the respondent's father back in 1995. The respondent should pay the costs of this case. Order accordingly.

DATED at **Mwanza** this 17th day of February, 2023.



Ntemi N. Kilekamajenga.
JUDGE
17/02/2023



Court:

Judgment delivered this 17th February 2023 in the presence of the respondent but in the absence of the appellant. Right of appeal explained.



Ntemi N. Kilekamajenga.

JUDGE

17/02/2023

