IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 39 OF 2022

(Originating from Application No. 140 of 2019 of the District Land and Housing Tribunal for Moshi at Moshi)

REV. ALPHEUS ZABLON SHAYO..... APPELLANT

VERSUS

AYOUB KISANGA..... RESPONDENT

JUDGMENT

13/3/2023 & 17/03/2023

SIMFUKWE, J.

This appeal emanates from the decision of the District Land and Housing Tribunal of Moshi (trial Tribunal). The brief history as captured from the record is to the effect that; the appellant herein instituted the land dispute before the trial tribunal against the respondent alleging that the respondent herein had trespassed into his piece of land located at Mnazi Mmoja Kiboriloni Ward, Moshi Municipality measuring 47 meters by 20 meters (disputed land). The appellant alleged that he bought and acquired the said disputed property since 1995 and he has been using it peacefully until 2019 when the respondent trespassed into that land. The respondent

claimed the said land to be his sister's property who is now deceased and that he was the administrator of her estate.

The trial tribunal decided that the disputed land belonged to the late Josephine Herbert Kisanga thus the same is part and parcel of the estate which was being administered by the respondent. The appellant was aggrieved, he filed this appeal and advanced ten grounds of appeal as reproduced hereunder:

1. *That, the learned trial Chairperson erred in law and fact by declaring the Respondent as the owner of the suit land contrary to his pleading ie written statement of defence in which he never stated the suit land to be part of the estate of Josephine Herbert Kisanga.*
2. *That, the learned trial chairperson erred in law and fact by declaring the Respondent as the owner of the suit land contrary to his pleading ie written statement of defence in which he asserted nothing about him owning the suit land.*
3. *That, the learned trial Chairperson erred in law by hearing the matter and entering judgment in favour of the Respondent contrary to evidence adduced at the trial.*
4. *That, the learned trial Chairperson erred in law and fact as he failed to properly evaluate evidence as a result, he reached a wrong conclusion.*
5. *That, the learned trial chairperson erred in law and fact by declaring that the suit land is part of the estate of Josephine Herbert Kisanga while on evidence the said Josephine Herbert Kisanga has never owned the suit land.*

6. *That, the learned trial chairperson erred in law and fact by declaring that the suit land is part of the estate of Josephine Herbert Kisanga despite long occupation of the suit land by the Appellant amounting to 24 years without interruption.*
7. *That the learned trial chairperson erred in law and fact by declaring that the suit land is part of the estate of Josephine Herbert Kisanga despite long occupation of the suit land by the Appellant amounting to 24 years without interruption.*
8. *That, the learned trial chairperson erred in law and fact by declaring that the suit land is part of the estate of Josephine Herbert Kisanga despite the fact that the Appellant occupied and used the suit land for over 18 years during the lifetime of the said Josephine Herbert Kisanga who never complained or objected.*
9. *That the learned trial chairperson erred in law and fact by declaring that the suit land is part of the estate of Josephine Herbert Kisanga despite the fact that the claim and defence if any by the Respondent was time barred.*
10. *That, the learned trial chairperson erred in law and fact by declaring that the suit land is part of the estate of Josephine Herbert Kisanga despite the fact that the Respondent lacking (sic) locus standi.*

During the hearing of this appeal which proceeded orally, the appellant was represented by the learned counsel Mr. Elikunda Kipoko while the respondent was represented by Mr. Gideon Mushi, learned counsel.

Mr. Kipoko argued the first and second grounds of appeal jointly to the effect that; the disputed land was illegally declared to be part of the estate

of the deceased Josephine Herbert Kisanga because of the following reasons; First, the parties to the case were in their capacities. Thus, it was not correct to include the deceased in the decision while she was not part of the dispute. Mr. Kipoko clarified that, parties are bound by their pleadings. That, in his written statement of defence, the respondent did not state that the disputed land was part of the estate of the deceased Josephine Kisanga; as opposed to the written statement of defence of the respondent, the applicant stated his claim in his application clearly.

On the second clusters of grounds of appeal which covers the 3rd to 9th grounds of appeal, Mr. Kipoko submitted that if the trial chairman properly analysed evidence before it, he could have arrived to a conclusion that the appellant who was then applicant occupied and used the suit land for more that 24 years without any dispute. That, the trial chairperson faulted the appellant herein who was the applicant on the ground that the applicant purchased the suit land from someone Godfrey Lyimo (PW2) who had no capacity to sale and there was no documentary evidence for the said sale. It was Mr, Kipoko's assertion that even if it is taken that Godfrey Lyimo had no capacity to sale, still the occupation of the suit land by the appellant for more than 24 years was adverse possession to whoever might have had any claim. Thus, the applicant now the appellant had acquired good title over the suit land by way of adverse possession.

The learned counsel continued to submit that on part of the respondent, his evidence was a mere police loss report which did not state what item was lost. That, the said loss report did not refer to "**Mkataba wa Manunuzi**" by Josephine Kisanga to be the item lost as the only evidence that the trial tribunal based its decision to decide in favour of the late Josephine Herbert Kisanga. It was the opinion of Mr. Kipoko that, a police

report does not suffice the weight it was given not only because it did not make reference to the suit land but as well on the fact that the appellant had used the land during the life time of the late Josephine Herbert Kisanga for more than 18 years without registering any complaint.

On that basis, the learned counsel was of the view that the only conclusion which the trial tribunal could have reached was to declare the appellant the lawful owner by adverse possession.

On the third cluster of his submission under the tenth ground, it was submitted that Ayoub Kisanga the respondent had no capacity on his own name to defend and parade whatever evidence against the applicant who is now the appellant over the suit land.

With all those grounds, Mr. Kipoko implored the court to allow the appeal with costs.

In reply, Mr. Mushi strongly opposed the grounds of appeal and referred to **section 45 of the Land Disputes Courts Act**. From Mr, Kipoko's submissions, the learned counsel for the respondent submitted that the same is based on admission of evidence. He opined that if there was any omission or error in admission of evidence, it did not occasion miscarriage of justice on part of the appellant. He supported his argument with the case of **Yakobo Magoiga Kichere vs Penina Yusuf, Civil Appeal No. 55 of 2017**, CAT at Mwanza (unreported) which held that courts should not base their decisions on technicalities rather on substantive justice.

It was submitted further that it is trite principle of law that in civil cases the standard of proof shall be on balance of probabilities, that, the one whose evidence is heavier is the one who is supposed to win the case. He

cited the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113** to buttress his argument.

In the instant matter, Mr. Mushi averred that the appellant alleged to own the land located at Mnazi Mmoja Kiboriloni measuring 47 meters by 20. He claimed further that he acquired that land in 1993. However, he did not tender any proof either sale agreement or any other document signifying that he was actually the owner of the suit land. That, it is trite law that once you claim ownership of land, you should have evidence to prove the same.

Mr. Mushi challenged the submission by Mr. Kipoko who stated that the respondent tendered the loss report only while the respondent tendered before the trial tribunal the sale agreement between Edson Kihwelo and Josephine Kisanga which was admitted as Exhibit D2.

Challenging the assertion that the appellant had used the said land for 24 years and thus acquired the same under adverse possession, it was the submission by Mr. Mushi that one cannot claim ownership under the doctrine of adverse possession as long as he is the applicant. That, the said principle can be used by the defendant and not the applicant. Thus, the allegation that the appellant was possessing the disputed land for 24 years should have been treated as a preliminary objection before the trial tribunal. He opined that since the same was not addressed before the trial tribunal, then it is not supposed to be discussed at this stage. To support his argument, he referred to the case of **NMB PLC vs Risase Ndama [1997] TLR 282** which held that objections have to be taken at first instance. Thus, in the present case as there had been no objection recorded, it cannot be raised at appellate stage.

Further to that, Mr. Mushi elaborated that as per the Regulations of the Tribunal particularly the form and content of Written Statement of Defence, there is no form and content prescribed by the said Regulations. Thus, one can reply whatever. He was of the firm view that since the judgment must be composed from the evidence adduced in court, that's what made the tribunal to decide that the disputed land was the property of the deceased Josephine Kisanga which is supposed to be administered by the administrator of the estate who is the respondent herein. He supported his argument by the case of **Nkungu vs Mohamed [1984] TLR 46** which held that:

> *"Judgments must be based on evidence adduced during trial and not otherwise."*

Basing on the above authority, the learned counsel submitted that evidence on part of the respondent was heavier compared to the weak evidence of the appellant.

On the issue that the respondent had no *locus standi*, it was submitted that the ground has no merit as the suit before the trial tribunal was instituted by the appellant. Thus, he should have known the right person to be sued.

On the 9th ground of appeal that the defence of the respondent was out of time before the trial tribunal, it was submitted that the said issue was supposed to be raised before the trial tribunal as it was held in the case of **NMB vs Risase** (supra)

In his conclusion, Mr. Mushi submitted that this appeal has no merit and should be dismissed with costs and confirm the decision of the trial tribunal together with all its orders.

In his rejoinder, Mr. Kipoko started with the issue of time of defence. He re-joined that; time limitation can be raised at any stage.

Responding to the cited case of **Hemed vs Mohamed Mbilu** (supra) and **section 45 of the Land Disputes Courts Act** in relation to evidence, Mr. Kipoko stated that the appellant's complaint is not that there was irregularity or improper admission of evidence, rather the submission is that there were two types of evidence before the trial tribunal; the appellant's evidence was based on long occupation of the suit land conferring him title under adverse possession while the respondent's evidence was a mere police loss report of the alleged purchase agreement. He argued that the appellant's evidence was much heavier and the tribunal should have declared him owner of the suit land.

Responding to Mr. Mushi's allegations that the decision of the trial tribunal was justifiable simply because it was based on evidence, Mr. Kipoko specified that his submission is not only that the respondent had no evidence at all but also the trial chairman was by law supposed to be bound by the pleadings of the parties. Thus, all the cases cited by Mr. Mushi for the respondent are not relevant to this case rather the relevant case is the case of **James Frank Ngwagilo vs The A.G [2009] TLR 161** in which the court stated that:

> *"Parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or it is at variance with what is stated in the pleadings must be ignored."*

On the strength of the above authority, it was stated that the relevant pleading on part of the respondent was the Written Statement of Defence

and the evidence adduced by the respondent contradicted the Written Statement of Defence.

On the aspect of *Locus standi*, the learned counsel re-joined that is true that the respondent was sued on his personal capacity and he replied in his Written Statement of Defence in personal capacity. That, the same was dated 25.09.2019. However, in his defence he tendered exhibit D1 which is dated 2021. Thus, he had no *locus standi* in that case.

Re-joining on the issue of the format of Written Statement of Defence, Mr. Kipoko admitted that the law does not prescribe format. However, the law prescribes the content of the Written Statement of Defence.

Regarding exhibit D1 and D2 which are the letters of administration of the estate and loss report respectively, Mr. Kipoko replied that he did not discuss exhibit D2 because it was referred as Sales agreement while it was a loss report.

Mr. Kipoko reiterated that this court should find this appeal has merit and allow it with costs and declare the appellant lawful owner of the disputed land.

Having carefully examined the entire record and heard the submissions of the parties in support and against the grounds of appeal, I now scrutinize the said grounds of appeal having in mind that this being the 1st appellate court, I am enjoined to reconsider and re- evaluate the entire evidence on record and if warranted draw my own conclusion. See the case of **Yustus Aidan vs Republic, Criminal Appeal No. 454 of 2019** CAT at Arusha.

The appellant through his advocate has raised ten grounds of appeal, and I will deal with them in the order adopted by the appellant's counsel.

However, I have opted to start with the last ground of appeal since the same touches the issue of law.

On the tenth ground of appeal, it has been argued that the respondent had no *locus standi* on his own to defend and parade whatever evidence against the appellant since he was sued on his capacity. The learned counsel for the respondent argued to the contrary that the ground has no merit since the suit was instituted by the appellant who should have known the right person to be sued.

In order to answer this ground, I appreciate the meaning of *locus standi* as elaborated in the case of **William Sulus vs Joseph Samson Wajanga (Civil Appeal No.193 of 2019) [2023] TZCA 92** (Tanzlii) that *locus standi* is the capacity to bring an action or to appear in court. That, for a person to institute a case he must have *locus standi*.

Before the trial tribunal, the respondent herein was sued by the appellant who is now claiming that the respondent had no *locus standi.* I am of the same opinion like Mr. Mushi that since the respondent was sued by the appellant, then the appellant cannot claim at the appellate stage that the respondent had no *locus standi*. I rest the tenth ground of appeal as such.

Coming to the first cluster of the grounds of appeal which touches the 1st and 2nd grounds of appeal. It has been argued that the deceased was declared the owner while the respondent never stated the suit land to be his or part of the estate of the late Josephine Herbert Kisanga. That, the parties were in their personal capacities; thus, it was not correct to include the deceased who was not part of the dispute in the decision and the respondent did not state so.

According to the proceedings of the trial tribunal; in 2019, the respondent was sued on his personal capacity. Later on, he was appointed to be administrator of the estate in 2021 when the case was still pending before the tribunal. In his Written Statement of Defence, the respondent did not state that he was the administrator of the estate of the late Josephine Kisanga as he was not yet appointed to be the administrator. However, after being appointed in 2021, on 26th October, 2021 the respondent filed notice to produce additional documents which included Letters of Administration in Probate Cause No. 02 of 2021 of Himo Primary Court. The said document was admitted without being objected by the learned counsel of the appellant. The respondent stated before the trial tribunal that the disputed land was the property of his late sister Josephine Kisanga, the fact which was supported by testimonies of witnesses of the appellant including the appellant himself. Therefore, the first cluster of the grounds of appeal lacks merit.

Lastly, the second limb of the grounds of appeal touches the 3rd to 9th grounds of appeal; which are in respect of evaluation of evidence. It has been argued that the trial Chairperson did not properly evaluate the evidence. It has been averred that the appellant who was then the applicant occupied and used the suit land for more than 24 years without dispute. That, the same was supported by evidence. The appellant's counsel alleged that the only evidence presented by the respondent was a loss report which the tribunal relied upon to decide in favour of the respondent.

I wish to state at this juncture that the standard of proof in civil cases is on a balance of probabilities. The meaning of balance of probabilities has been elaborated at page 17 in the case of **Jackson Sifael Mtares &**

Others vs The Director of Public Prosecutions (Criminal Appeal 180 of 2019) [2021] TZCA 612 that:

> *"The standard of proof on a balance of probabilities simply means that, the court will sustain such evidence which is more credible than the other on a particular fact proved."*

Having this principle in mind, I venture to consider the evidence adduced by the parties before the trial tribunal in respect of the appellant's claim. Whether the appellant who was then the applicant proved the case on balance of probabilities is the main bone of contention in these grounds. Both parties argued that they had heavier evidence than the other.

At page 49 to 50 of the untyped proceedings of the trial tribunal, SM1 stated inter alia, I quote:

> *"Nakumbuka mwaka 1994 kwenye eneo hili kulikuwa na viwanja vinauzwa. Hivyo viwanja vilinunuliwa na: -*
>
> 1. *Godfrend Lyimo- kimoja.*
> 2. *Elipaus Makundi – kimoja.*
> 3. *Mch. Alpheus Shayo (Mdai)*
> 4. *Josephine Kisanga.*
>
> ***Mwaka 1995 Mch. Alpheus Shayo alijenga uzio akaunganisha kiwanja chake na cha Josephine Kisanga. Amemiliki mpaka leo."*** *Emphasis added*

At page 52 when re-examined by Advocate Kipoko, SM1 replied inter alia that:

"- ***Eneo lenye mgogoro lilikuwa la Josephine.***

- *Mwaka 1995 sikujua kilichotokea ila niliona Mchungaji ameweka fensi." Emphasis added*

SM2 Godfrey E. Lyimo testified among other things that he was asked by the deceased Josephine to sale her land and that he sold it to pastor Shayo. When cross examined by the tribunal assessor Mrs Lukindo, he replied inter alia that:

"Wakati nauza Josephine alikuwa Iringa hivyo hakuwepo."

SM2 responded to the second tribunal assessor Mrs Mchau that:

"Hakuna maandishi ya kuuziana na Mchungaji."

SM3 (appellant herein) when cross examined by Mr. Mushi before the trial tribunal, he told the tribunal among other things that:

"- Nilinunua eneo hili mwaka 1995 toka kwa Josephine akiwakilishwa na mwakilishi wake Godfrey Aliamsuli Limo.

- *Godfrey aliniuzia eneo la hatua 20 kwa 20.*
- ***Mkataba wa 23/9/1994 niliuona kuwa Josephine Kisanga amenunua eneo la hatua 20 kwa 20 toka kwa Edson.***
- ***Hatukuandika mkataba wowote kati yangu na Godfrey**."* Emphasis added

On his part, the respondent herein who was the only witness before the trial tribunal, in short, he told the trial tribunal that the disputed land belonged to his sister Josephine who purchases it from one Edson Kiwelu and pointed out that the size of the said land was 20x20. He supported his testimony with exhibit D1 (Letter of appointment of the respondent to be administrator of the estate of the late Josephine Kisanga), exhibit D2

(Sale Agreement between Edison N. Kiwelu and Josephina Kisanga) and D2 (Loss report dated 6th October 2021, which I guess should have been labelled exhibit D3).

It is crystal clear that the above quoted pieces of evidence on part of the appellant corroborates evidence of the respondent. Evidence of the appellant did not contradict the fact that part of the disputed land was purchased by the deceased Josephine Kisanga from one Edson Kiwelu. His evidence supported the testimony of the respondent.

The learned counsel for the appellant had two versions of the story: First he alleged that the appellant had acquired the disputed land in 1995 when he purchased it. As it has been quoted herein above, unfortunately, the appellant alleged that the said sale agreement was not written. Second, Mr. Kipoko gave the opinion that since the appellant had stayed on the disputed land for 24 years undisturbed, he had acquired the same under the doctrine of adverse possession. Mr. Mushi learned counsel for the respondent was of considered opinion that the appellant did not tender any proof either sale agreement or any other document signifying that he was actually the owner of the suit land. That, it is trite law that once you claim ownership of land, you should have evidence to prove the same. Mr. Mushi challenged the submission by Mr. Kipoko who stated that the respondent tendered the loss report only while the respondent tendered before the trial tribunal the sale agreement between Edson Kihwelu and Josephine Kisanga which was admitted as Exhibit D2.

Challenging the assertion that the appellant had used the said land for 24 years and thus acquired the same under adverse possession, it was contended by Mr. Mushi that one cannot claim ownership under the

doctrine of adverse possession as long as he is the applicant. That, the said principle can be used by the defendant and not the applicant.

The learned counsels of both parties did not exhaust the conditions of the doctrine of adverse possession. With due respect, I am obliged to restate the conditions of the said doctrine as expounded in the land mark decision in the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016** (unreported), in which the Court of Appeal of Tanzania held that:

> *"…. a person seeking to acquire title to land by adverse possession had to* ***cumulatively prove the following****:*
>
> ***a)*** *That,* ***there had been absence of possession by the true owner through abandonment;***
>
> *b) That, the adverse possessor had been in actual possession of the piece of land;*
>
> ***c)*** *That****, the adverse possessor had no colour of right to be there other than his entry and occupation;***
>
> *d) That, the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
>
> *e) That, there was a sufficient animus to dispossess and an animo possidendi;*
>
> *f) That, the statutory period, in this case twelve (12) years has elapsed*
>
> *g) That, there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*

h) That, the nature of the property was such that in the light of the foregoing, adverse possession would result." Emphasis mine

In another case of **Origenes Kasharo Uiso vs Jacquilin Chiza Ndirachuza, Civil Appeal No. 259 of 2017,** (unreported), the Court of Appeal of Tanzania cemented that:

> *"No declaration can be sought on the basis of adverse possession in as much as* ***adverse possession can be used as a shield and not as a sword*** *….* ***the appellant cannot rely on the principle of adverse possession in a case which he is a plaintiff."*** Emphasis added

Guided by the above cited case laws, it goes without saying that the story of the appellant on how he acquired the suit land does not fit the laid down conditions for one to rely on the doctrine of adverse possession. As rightly submitted by Mr. Mushi the doctrine may be used as a shield when one is sued in a land dispute and not as a sword in a sense that you cannot initiate proceedings claiming ownership of land under the doctrine of adverse possession. In the instant matter the appellant alleged that he purchased the disputed land from one Godfrey Lyimo who sold it on behalf of the deceased Josephine Kisanga. The application before the trial tribunal was filed by the appellant. The two noted facts, suffice to dispose of the issue of the appellant to had acquired the disputed land by adverse possession.

Basing on the above findings, I hesitate to interfere with the findings of the trial tribunal. Evidence of the respondent overweighed evidence of the appellant on balance of probabilities. I therefore confirm the decision of the trial tribunal and dismiss this appeal with costs.

It is so ordered.

Dated and delivered at Moshi This 17th day of March, 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

17/03/2023