IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

LAND APPEAL NO. 35 OF 2022

(Originating from the District Land and Housing Tribunal for Karatu, Application No. 4 of 2020)

AMERITHA MALANGE ..... APPELLANT

Versus

ARUSHA KEHA ..... RESPONDENT

JUDGMENT

22nd February & 28th April 2023

Masara, J.

Arusha Keha, the Respondent herein, successfully sued **Ameritha Malange,** the Appellant herein, and her son, **Manday Malange,** over a piece of land measuring 1¼ acres, located Awaraat hamlet, Endamarariek village and ward, within the District of Karatu ("the suit land"), in the District Land and Housing Tribunal for Karatu District ("the trial tribunal"). The Respondent sought and obtained a declaratory order that he was the lawful owner of the suit land. The Appellant and her son were ordered to give vacant possession of the suit land. The trial tribunal further permanently restrained them from trespassing and using the suit land. They were also ordered to pay costs to the Respondent.

According to the evidence on record, the Appellant alleged to have acquired possession of the suit land from her father-in-law in 1990, after

she got married to his son who was the Respondent's brother. That she was in occupation of the suit land without interference until when her husband died in 2013. That in 2016 the fracas began, when the Respondent unlawful entered into the suit land, harassed and thwarted the Appellant's son who was working in the suit land.

On his part, the Respondent claimed to have acquired the suit land from his father in 1999. That he occupied and used it until on 27th January 2018 when he found the Appellant's son cultivating the same by using a tractor. That as he tried to stop him, the Appellant's son assaulted him and cut him with a panga on the head. The Respondent was taken to the hospital whereas the Appellant's son continued cultivating the suit land. The case was referred to the police station, leading to the arrest and prosecution of the Appellant's son at Karatu District Court vide Criminal Case No. 18/2019.

After trial, the Appellant's son was found guilty, convicted and sentenced to serve a custodial sentence of one year. That he was released on a presidential pardon before finishing the sentence. After his release from prison, in January 2020, he continued trespassing in the suit land. That is when the Respondent decided to institute a suit in the trial tribunal.

After hearing the parties and their witnesses, the trial tribunal held that the Respondent managed to establish how he acquired the suit land. The Respondent was declared the lawful owner of the suit land. The basis of the trial tribunal's decision was that the Respondent's father, who had two wives, had allocated 14 acres of his land to each wife prior to his death. The wives later re-distributed their pieces of lands to their children. The Appellant was dissatisfied with the decision. She preferred this appeal on the following grounds:

a) *That the Respondent's case was so wanting and as a result the case has not been proved on the preponderance of probabilities;*
b) *That the trial chairperson misapplied principles of adverse possession on ownership of land in holding that the Law of Limitation Act, Cap. 89 [R.E 2019] favours the present Respondent while in fact the principle is not applicable in the circumstances of the case:*
c) *That the chairperson of the District Land and Housing Tribunal erred in law and facts in disregarding what has transpired in the previous Land Dispute No. 11 of 2016 before Endamararick Ward Tribunal and subsequent Land Appeal No. 10 of 2016 before District Land and Housing Tribunal for Karatu;*
d) *That the analysis of evidence made by the trial chairperson of the District Land and Housing Tribunal was one sided and biased as against the Appellant; and*
e) *That the transfer of the case file to the Chairperson who had concluded hearing and composed the judgment resulted into*

misapprehension of the facts of the case and the resultant erroneous decision.

The record shows that on 12/12/2022, counsel for the Appellant prayed to file additional grounds of appeal. Leave was granted, and one additional ground termed as ground number six was filed in the written submission. The said additional ground reads as follows:

That, the opinion of assessors of the trial tribunal were not recorded and read to the parties in accordance to the law.

By consensus, it was resolved that hearing of the appeal proceed by way of written submissions. Mr Bungaya Matle Panga, learned advocate appeared and submitted for the Appellant, Mr Lengai Nelson Merinyo, learned advocate appeared and submitted on behalf of the Respondent.

In his submission, Mr Panga abandoned the 5th ground. The 1st and 4th grounds were argued jointly. Grounds 2, 3 and 6 were dealt with separately. Submitting in support of the 1st and 4th grounds, the Appellant's counsel contended that there was no documentary evidence, such as deed of gift, tendered to prove the transfer from his father to the Respondent. He alluded that a transfer of a right involving a customary right of occupancy ought to be in writing so as to avoid further disputes. To support that argument, the learned advocate relied on the decisions in **Priskila Mwainunu vs Magongo Justus, Land Appeal No. 09 of**

2020; Ahmad Mutungi (Administrator of the Estate of the late Abdul Ibdu Ibrahim Mutungi) vs Tanzania Building Agency and 2 Others, Civil Appeal No. 4 of 2012 and **Issa Ahmed vs Abdul Mohamed, Misc. Land Application No. 72 of 2010** (All unreported). It was his further argument that the trial chairperson did not consider the Appellant's testimony in his analysis of evidence, hence he prays that this Court re-evaluate the evidence on record and come up with its own findings.

Submitting on the 2nd ground of appeal, Mr Panga contended that the chairman of the trial tribunal misdirected himself by applying the principle of adverse possession in determining ownership of the suit land. He accounted that the trial chairperson found that the Respondent has been in use of the suit land for more than 12 years therefore protected by the provisions of item 22 of the schedule to the Law of Limitation Act, while the principle is only applicable as a defence and not as a sword. That, since the Respondent herein was the Applicant in the trial tribunal, he could not be covered by the Law of limitation. To reinforce his contention, he cited the case of **The Attorney General vs Mwahezi Mohamed (As administrator of the estate of the late Dolly Maria Eustace) and 3 Others, Civil Appeal No. 391 of 2019** (unreported).

Elaborating the 6th (additional) ground, Mr Panga fortified that the law requires the tribunal chairman to inquire opinion of the assessors who participated at the hearing of the case and the opinion must be in writing. He relied on Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N No. 174 of 2003 (henceforth G.N No. 174 of 2003). He added that in the trial tribunal, neither assessors' opinions were recorded nor were they read to the parties before composing the judgment. Reliance was placed in the Court of Appeal decision in **Sikuzani Saidi Magambo & Another vs Mohamed Noble, Civil Appeal No. 197 of 2018** (unreported). He thus urged the Court to nullify the proceedings of the trial tribunal for contravening the law.

Based on the submission, he prayed that the appeal be allowed, the Appellant be declared the lawful owner of the suit land and in alternative, the proceedings and decision of the trial tribunal be nullified on the basis of the sixth ground.

In rebuttal, Mr Merinyo submitted that evidence adduced by both parties was based on oral testimonies as there was no document tendered by either of the parties. He accounted that the suit land is un-surveyed, typically falling under the Village Land Act. That it was not mortgaged nor

disposed but the Respondent acquired it as a gift from his father. He used and occupied the same uninterruptedly, hence documentary evidence was immaterial in proving ownership. He distinguished the cases relied on by the Appellant's counsel, stating that they are only persuasive in this Court. In turn he relied on this Court's decision **in Kuli Tacto Awu vs Jacob Shangwe Yatosh, Land Appeal No. 08 of 2021** (unreported). Mr Merinyo was of the view that the Appellant's evidence was contradictory while that of the Respondent was corroborated by credible witnesses. It was his view that the trial chairman made thorough analysis of evidence, hence the judgment was supported by the evidence on record.

Regarding the 2nd ground of appeal, Mr Merinyo fortified that the Respondent's success in the trial tribunal was not based solely on the principle of adverse possession. He maintained that the evidence gathered was sufficient to establish that the Respondent was given the suit land by his father as a gift. It was his further view that the doctrine of adverse possession is not automatic over a registered land unlike unregistered land, hence the tribunal's analysis involving the adverse possession principle has not occasioned any injustice. He urged the Court to invoke section 45 of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and the

authority in **Yasini Ramadhan Chang'a vs Republic [1999] TLR 489** to disregard the complaint.

Responding to the 6th ground, the Respondent's counsel amplified that the argument that the assessors' opinions were not recorded and read to the parties is unfounded referring to the typed proceedings of 10th and 15th March 2022. He stated that after closure of the defence, the tribunal chairman directed the assessors to give their opinion in writing, the same were recorded in Kiswahili language and were read to the parties before composing the judgment. Further, that the opinions of the assessors were referred to in the tribunal decision as reflected at page 4 of the typed judgment. He concluded by urging the Court to dismiss the appeal with costs.

I have sufficiently considered the grounds of appeal; the trial tribunal records and the submissions by both counsel for the parties. The issue to consider is whether the appeal is merited. I opt to determine this issue by considering the grounds of appeal as presented by counsel. However, I find it apt to deal with the last ground. Notably, the 3rd ground of appeal was not canvassed by counsel. Invariably, I take it to have been abandoned alongside the 5th ground of appeal.

The last ground challenges the trial tribunal proceedings for failure to comply with Regulation 19(2) of G.N No. 174 of 2003. The Appellant's counsel submitted that the assessors' opinions were neither recorded in writing nor were they read to the parties before composing the judgment. On my part, upon close perusal of the proceedings, both typed and handwritten, they convey that after closure of the defence case, the trial chairman made the following order:

*"**AMRI**:*

- *Maoni ya wajumbe tarehe 15/3/2022.*
- *Kutaja tarehe 15/3/2022*
- *Imesainiwa M. R. Makombe Mwenyekiti 10/3/2022."*

The proceedings of 15/03/2022 as reflected at page 21 of the typed proceedings show that the assessors' opinions were recorded and read to the parties on that day. The case was fixed for judgment on 17/03/2022. According to the trial tribunal record, opinion of both assessors, Mr John Akunaay and R. Panga both dated 13/03/2022 featured in the trial tribunal record. That entails that the requirements of Regulation 19(2) of G.N No. 174 of 2003 were complied with. Similarly, the principle restated in the case of **Sikuzani Said Magambo & Another vs Mohamed Noble** (supra) was adhered to. Hence, the 6th ground of appeal is found devoid of merits and accordingly dismissed.

I now turn to the 2nd ground of appeal. Mr Panga faulted the decision of the trial tribunal for relying on the principle of adverse possession in

determining ownership of the suit land. Having revisited the trial tribunal judgment, despite the fact that the tribunal chairperson did not specifically make a finding that the Respondent acquired the land through adverse possession, the judgment itself supports such fact. At page 3 of the judgment, the trial chairman stated that the Respondent was in occupation of the suit land from 1990, therefore he was covered by the Law of Limitation Act, specifically item 22 of 1st Schedule. He added that the law recognizes a person who has occupied land for a long period of time to be lawful owner of the same.

As a matter of law, the principle of adverse possession was inapplicable in the case. I hold this view considering the authoritative decisions of the Court of Appeal on applicability of the principle of adverse possession. The Court of Appeal in the case of **Registered Trustees of the Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016** (unreported), had the following to say regarding adverse possession:

> *"Possession could never be adverse if it could be referred to a lawful title, such as the present situation which was based on alleged grant. It has always been the law that permissive or consensual occupation is not adverse possession. Adverse possession is occupation inconsistent with the title of the true owner, that is, inconsistent with and in denial*

of the right of the true owner of the premises (see the referred English cases of Moses v Lovegrove and Hughes v Griffin (supra)."

From the above position of the law, the principle is inapplicable in the case at hand for the following reasons: ***First,*** the disputed land was not an abandoned land; ***second,*** there was no absence of the true owner because the Respondent claimed to have acquired the suit land from his father as a gift; ***and third,*** the Respondent claimed to have the right to own the suit land after being allocated the same, unlike adverse possessor who must have no colour of right.

I am therefore in agreement with Mr Panga that the principle is inapplicable in the case at hand. However, the trial chairman did not apply the principle as the basis for declaring the Respondent the lawful owner of the suit land. The basis for determining ownership in the trial tribunal took into consideration the evidence adduced, as shall be apparent while determining the remaining grounds of appeal. That said, the 2nd ground of appeal is dismissed as well.

I now revert to the 1st and 4th grounds of appeal. Mr Panga invited this Court to re-evaluate the evidence and come up with its own findings. It is settled law that the duty of the first appellate court, such as this, is to reconsider and re-evaluate the evidence and come to its own conclusions

bearing in mind that it never saw the witnesses as they testified. See: **Ali Abdallah Rajabu vs Saada Abdallah Rajabu and Others [1994] TLR 132** and the ancient case of **Pandya vs Republic (1957) EA 336**. I will respectably re-evaluate the evidence of the witnesses to appreciate whether the conclusion reached by the trial tribunal was proper.

At the outset, I must agree with the Appellant's counsel that there was no documentary proof tendered by either of the parties to support the transfer of the suit land from the original owner to their possession. That notwithstanding, proof of ownership of a piece of land need not necessarily be through documentary evidence, especially where the land in question is a village or customary land.

In his evidence, the Respondent (PW1) informed the trial tribunal that he was given the suit land by his father as a gift way back in 1999. He continued occupying and using the same until 2013 when his brother (the Appellant's husband) died. He continued using the land until on 27th January 2018 when, for the first time, he found the Appellant's son cultivating it. Tracing historical background of his ownership, he accounted that his father had two wives. Before his death, he allocated 14 acres of land to each wife so that each wife would occupy and re-distribute amongst her children. According to the Respondent's evidence,

the suit land is within the 14 acres allocated to his mother. He added that the Appellant's husband was allocated 4½ acres, which is the Appellant's land to date.

The Respondent's evidence was corroborated by that of Gitu Keha (PW2). PW2 testified that the suit land was allocated to the Respondent by his father. He added that the suit land is part of the 14 acres allocated to the Respondent's mother, since each wife was allocated 14 acres. PW2 further accounted that, being part of the family, he owns 2 acres, the Appellant 4½ acres, Hillu 3½ acres and Fredy has 2 acres. That evidence was also corroborated by that of Anzila Lohay (PW3) who claimed to be relative and neighbour to the suit land. She accounted that the suit land originally belonged to the Respondent's father, but he later gave it to the Respondent. The Respondent continued cultivating the suit land after his father's death. PW3 stressed that it was the Respondent who has been in occupation and use of the suit land for all those years, until recently when the Appellant and her son trespassed into the same and injured the Respondent.

On her part, the Appellant claimed that the suit land was allocated to her by her father-in-law in 1990 after she married his son. She accounted that she continued using the suit land until her husband's death in 2013, when

the Respondent trespassed and dispossessed her of the suit land. When cross examined by the Respondent, the Appellant admitted that she owns 4 acres of land. She further testified that her husband died in 2013, but the fracas started in 2016.

The Appellant's son, who testified as DW1, stated that since his childhood, he has been cultivating the suit land, adding that the suit land was allocated to his father and mother in 1990 and that they continued using the same to date. DW1 contended that the Respondent had another case in the trial tribunal which ended in 2019, where he was allocated another piece of land, but later he trespassed another piece which is the suit land. Askwari Dungus (DW3) testified that the suit land belonged to Marange Keha and that it was allocated to him in 1993. According to DW3, when the suit land was allocated to Marange Keha in 1993, the Respondent's family was not consulted.

From the above, I find the Appellant's evidence to be short of the required standards based on what transpired at the trial. It is noted that DW1 and DW2, who testified as defence witnesses, stated that the suit land was allocated to Malange Keha (the Appellant's husband) but they did not disclose the source that allocated the same. Second, while DW1 and DW2 testified that the suit land was allocated to the Appellant in 1990, DW3,

who claimed to have been present when the same was given to the Appellant's husband, said that it was given to him in 1993. Third, the Appellant and DW1 testified that the Appellant trespassed in the suit land in 2016, but they made no initiatives to stop him from trespassing in the suit land. Fourth, there was no evidence by all defence witnesses describing the exact size of land allocated to the Appellant, whether it is only the suit land or plus the 4 acres that she admitted to own. The above shortfalls in the Appellant's evidence, coupled with the fact that she did not prove to occupy the suit land from 1990 when she alleged to have been given the same, diminishes the evidential value of the defence evidence.

This Court finds the Respondent's evidence well corroborated by that of PW2, a relative of both Appellant and Respondent and PW3. The uncontroverted evidence was that the suit land was part of the land owned by his father. Later it was partitioned to the two wives, where each of them got 14 acres. They confirmed that the suit land forms part of the 14 acres allocated to the Respondent's mother. PW3 substantiated that she knew the suit land as a neighbour since the time it was being utilised by the Respondent's father. She added that it was the Respondent who

was using the suit land from the moment it was allocated to him to the time it was trespassed to by the Appellant and her son.

In my view, the Respondent's evidence is credible and coherent, which I have no reasons to doubt. Consistent with the authority in **Hemed Said vs Mohamed Mbilu** (supra), the Respondent's evidence was weightier to that of the Appellant, as found correctly by the trial tribunal. It was therefore the duty of the Respondent to prove the ownership of the suit land on a balance of probabilities, which he did.

In **Paulina Samson Ndawanya vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017** (unreported), the Court of Appeal stated:

> *"It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."*

Discerning from the above analysis, it is my finding that the Respondent managed to prove, on the balance of probabilities, that he is the lawful owner of the suit land. I, thus, find the 1st and 4th grounds of appeal devoid of any merits, they are as well dismissed.

Consequently, from what I have endeavoured to show above, the appeal is devoid of any merit. It stands dismissed in its entirety with costs. The decision of the trial tribunal is hereby confirmed.

Y. B. Masara

JUDGE

28th April 2023