

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

LAND APPEAL NO. 10 OF 2022.

*[Arising from the District Land and Housing Tribunal for Tabora in
Land Appeal No. 45 of 2021.]*

JUMA KIPYAGU.....APPELLANT

VERSUS

YASIN RASHID..... RESPONDENT

.....
JUDGEMENT
.....

Date of Last Order 12/05/2023

Date of Delivery: 16/05/2023

AMOUR S. KHAMIS, J.

The appellant herein, Juma Kipyagu lodged a complaint before the Ndonno Ward Tribunal in Land Case No. 1 of 2021 claiming to be declared lawful owner of the land in dispute which is also occupied by the respondent Yasin Rashid. Juma Kipyagu was victorious and the trial tribunal ordered Yasin Rashid to vacate from the disputed land.

Aggrieved by the trial tribunal's decision, Yasin Rashid knocked the doors of the District Land and Housing Tribunal for Tabora where luck was on his side as the appellate Tribunal quashed the decision of the trial Tribunal and declared him as the lawful owner of the disputed property.

Juma Kipyagu was not contended with decision of the appellate Tribunal hence filed this appeal on three grounds, namely:-

1. That, the 1st appellate Court erred in law to quash the decision of the Ndono Ward Tribunal without justifiable reasons.
2. That, the 1st appellate Court erred in law to enter a judgement in favour of the respondent while there was ample evidence to show that the disputed premise belongs to the respondent.
3. That, the 1st appellate Court misapplied the doctrine of adverse possession and consequently reached a wrong decision.

The appeal was canvassed by way of written submissions and both asides complied to the timeline set by the Court. Before me, Juma Kipyagu was represented by Mr. Siraji Kwikima, advocate while Yasin Rashid had services of Mr. Kanani Chombala, learned advocate.

Mr. Kwikima argued the first and second grounds of appeals together. He submitted that it is a well settled position of law that in a civil case as the case which this appeal originates from, the claimant is burdened to prove his case on a balance of probabilities.

He contended that the appellant filed the land case at the Ndono Ward Tribunal seeking to recover possession of the suit premises from the respondent who was in occupation of the suit premises as a licence for agricultural purposes as it belonged to the appellant's maternal grandfather.

He contended that, in the trial Tribunal, the appellant managed to bring documentary evidences and a witness who testified adduced evidence in his favour, hence discharged his burden to prove the claims to the trial Tribunal.

Mr. Kwikima further contended that the respondent did not bring any documentary evidence to prove his claims that he lawfully purchased the suit premises from Juma Kihembe and his witness, Doto Selemani testified that Juma Kihembe licensed the respondent to use the suit premises for agricultural purposes.

The appellant's Counsel contended that the 1st Appellate Court erred in law to quash the decision of the Ndonno Ward Tribunal without justifiable reason and that the 1st appellate Court erred in law to enter a judgement in favour of the respondent while there was ample evidence to show that the disputed premise belong to the appellant.

Arguing on the third ground of appeal that the 1st appellate Court misapplied the doctrine of adverse possession and consequently reached a wrong decision, the appellant's Counsel contended that it is the finding of the Tabora District Land and Housing Tribunal that the respondent is an adverse possessor and hence the lawful owner of the suit premises for he has been in occupation of the suit premises for more than twelve years.

The learned advocate asserted that it is a pure misconstruction of the doctrine of adverse possession, because the respondent in his defence during trial by the Ndonno Ward Tribunal claimed to have acquired the suit premises by way of purchasing it from Juma Kihembe.

He argued that the doctrine of adverse possession is applicable to a person who trespassed onto the plot of land without being invited or licensed by the owner, and continued to occupy the land in a manner which is adverse to the interests of the owner who takes no steps to intervene for the period of twelve years and above.

He also argued that a licensee and the one claiming to have purchased the plot of land can never be accommodated by the doctrine of adverse possession. While claiming to be a purchaser, the respondent had to prove to the required standard how he purchased the suit premises.

Mr. Kwikima cited the case of **REGISTERED TRUSTEES OF HOLY SPIRIT SISTERS TANZANIA vs JANUARY KAMILI SHAYO AND 136 OTHERS, Civil Appeal No. 193 of 2016, Court of Appeal of Tanzania at Arusha** (unreported) where it was observed at page 25, that:

"... it is trite Law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or otherwise. Thus, on the whole, 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 color 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 animus possidendi;

(f) that the statutory period, in this case twelve years, had 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 ... "

The learned advocate asserted that the above mentioned are the conditions for the doctrine of adverse possession to apply and the same were not met by the respondent as he claimed to have purchased the same from Juma Kihembe.

Mr. Kwikima submitted that by declaring the respondent an adverse possessor of the suit premises, the Tabora District Land and Housing Tribunal misapplied the doctrine of adverse possession and consequentially arriving into a wrong decision.

Replying to this, the respondent's counsel, Mr. Kanani Chombala, contended that the first appellate Tribunal was justified in quashing the trial ward tribunal. The appellant's rival argument is that the respondent was licensed/given the land for temporary use.

In cementing his argument, he referred to the testimony of Doto Selemani and claimed that the said Doto Seleman testified

that he was present when Mzee Juma Kihembe licensed the shamba to the respondent.

Mr. Chombala argued that in the ward tribunal records, the said Doto Seleman was recorded as follows;

“Baada ya kujibu maswali ya balaza (sic) maelezo yake ni haya, Mimi Doto Seleman, mimi ndo wakumpeleka huyu Yasini rashidi kwa mpaka kwa Juma Kihembe; ukweli hilo eneo hakuuziwa na huyo mzee Kihembe. Nilichoshuhudia ni kumwazima ili wakati anatafuta awe na pakukaa. Ndohicho nilichoshuhudia. Kingine wakati anaazimwaa ilikuwa sehemu nyingine na anapoishi kwa sasa. Sehemu nyingine sikuwi papili kama alinunua nasema ukweli.”(emphasis ours)

Based on the above excerpt Mr. Chombala argued that it is true that the suit land which constituted the respondents home premises is not subject to the land which the witness witnessed as he clearly elaborates that “... *sehemu aliyoazimwa ni tofauti na sehemu anapoishi kwa sasa ... na hiyo sehemu anayoishi hajui kama alipanunua au la.*” It was his humble submission that the disputed land is not subject to the shamba which was leased to the respondent.

Mr. Chombala further contended that the evidence is very clear that Doto Seleman does not know and he was not involved at the time when the respondent was acquiring the suit land in dispute, thus it is against the law to hold that the Respondent was leased the disputed suit land.

Mr. Chombala went ahead to submit that another piece of evidence by the appellant which gives rise to the legal issue of

capacity by the appellant (loucs standi) is that the appellant testified that the said shamba was leased to the respondent in 1997 by the late Juma Kihembe and the said Juma Kihembe died in 2015.

From this testimony there is no dispute that the land in dispute as per the appellant's claim is the property of the late Juma Kihembe. Records show that there was no any letter of administration that was sought by the appellant before instituting the dispute which is against the ambit of the law that no one can have legal capacity to claim estate of the deceased person unless he holds letter of administration.

The learned advocate also submitted that another crucial fact to determine is that the said Juma Kihembe died in 2015. While the respondent has been occupying peacefully the disputed land from 1997 to 2018 when the dispute arose which is almost 21 years and computing from 1997 up to 2015 when the said Juma Kihembe died is almost 18 years.

Absence of any tangible evidence on record that Mzee Juma Kihembe did make any attempt to reclaim possession during his life, proves that the appellant's averments remain as a mere story too with no any legal effect than being an afterthought.

Lastly, Mr. Chombala submitted on the last limb of appeal that the appellant tribunal was correct in quashing the trial ward tribunal decision on ground of adverse possession, that the respondent has been occupying the disputed land since 1997 to 2018 when the suit case was filed is almost 21 years. It is from this fact where the doctrine of adverse possession stands.

After going through the rival submissions of the parties and both lower courts' proceedings, it has come to the notice of this Court that the appellant submitted in both lower Courts that the suit land belonged to the late Juma Kihembe who was his maternal grandfather.

The same was also cemented by his advocate Mr. Kwikima on page 1 of his submission in support of the appeal. However, all records from the trial Tribunal show that the appellant Juma Kipyagu instituted a suit in his personal capacity without first availing documents to show that he inherited the said suit land and / or letters of administration on the estate of the late Juma Kihembe whom he claims to be the original owner.

Locus standi is a jurisdictional issue as provided for in the case of **GODBLESS JONATH LEMA VS MUSA HAMIS & 2 OTHERS, Civil Appeal No. 47 of 2012** wherein the Court of Appeal quoted a decision in a Malawian Supreme Court in the case of **ATTORNEY GENERAL VS THE MALAWI CONGRESS PARTY AND ANOTHER, Civil Appeal No. 22 of 1996**, wherein it was held that:-

“Locus Standi is a jurisdictional case. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say unless he stands in a sufficient dose relation to it so as to give a right which requires prosecution or infringement of which he brings the action.”

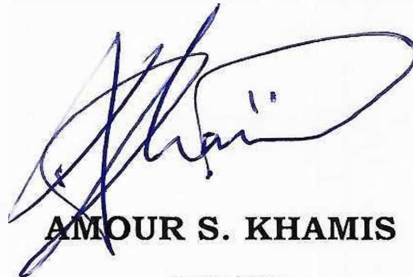
In that view, it is not safely guaranteed that Juma Kipyagu had locus standi in both lower tribunals. This was also noted by

the respondent's counsel in his reply to the appellant's submissions.

It is so unfortunate that the learned Chairman in the first appellate tribunal missed this anomaly as it could have been redressed timely before this appeal.

On that note, I invoke revisional jurisdiction as per Section 38(1) of the Land Courts Disputes Act, [Cap 216 R.E 2019] and nullify the entire proceedings before the two lower tribunals, quash and set aside the respective judgements and then direct that any action on behalf of the deceased Juma Kihembe be instituted by or against the administrator of estate of the late Juma Kihembe.

It is so ordered.

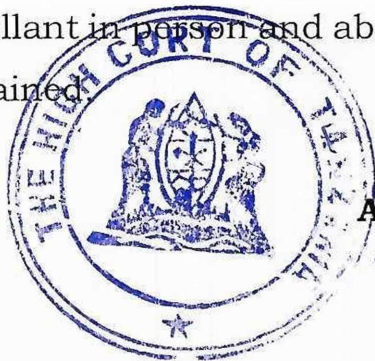


AMOUR S. KHAMIS

JUDGE

16/05/2023

ORDER: Judgment delivered in open Court in presence of the appellant in person and absence of the respondent. Right of Appeal explained



AMOUR S. KHAMIS

JUDGE

16/05/2023