IN THE UNITED REPUBLIC OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 23 OF 2021

(Originating from Land Application No. 9/2018 at The District Land and Housing Tribunal for Lindi at Lindi).

AHMAD SAID CHINGALA..... APPELLANT

VERSUS

YUSUPH MOHAMED MKWACHA ..... RESPONDENT

JUDGEMENT.

Date of last order: 15.03.2023

Date of Ruling: 03.05.2023

Ebrahim, J.

Aggrieved the decision of the DLHT for Lindi at Lindi, the appellant herein preferred the instant appeal raising six (6) grounds of appeal which mainly challenges the evidence of the respondents' witnesses to be weak and contradictory; the time limitation in instituting a land case; and failure by the Tribunal to visit locus in quo.

The respondent herein successfully instituted a suit against the appellant herein at the DLHT for Lindi at Lindi claiming that the appellant in 2006 trespassed into his un- surveyed land. The suit land is located at Namakungwa, Mapokezi Street at Ng'apa Ward within Lindi Municipality in Lindi Region. According to the records, the appellant was confronted by the respondent his own grandfather and agreement was reached that he shall immediately pay Tshs. 50,000/- being the value of the trespassed land so that he can retain the same. The appellant did not pay the same. It was on 7th July, 2017 that the respondent reminded the appellant to pay the agreed amount but he did not do so and according to the respondent's contention, the appellant claimed that it was his land. Following the act of the appellant, the respondent filed the suit in February 2018.

Responding to the claim by the respondent, the appellant filed a written statement of defence saying that he is the lawful owner of the suit land being allocated to him by Mitumbati Street Land Committee year 2000 and that he planted 22 cashew nut trees and other crops. He contended further that there is nothing to show that they had such amicable settlement with the

respondent and the respondent has no any legal right on the disputed land against him.

After hearing the evidence from both sides, the trial Tribunal decided in favour of the respondent on the reason that the appellant could not prove his position that he was allocated the land by the village government as he failed to call the village government leaders or even tendering minutes to prove that he was indeed allocated the suit land by Mitumbati Village. He however found that the respondent's evidence on the ownership of the disputed land was heavier than the appellant.

The appellant was dissatisfied with the decision of the trial Tribunal hence the instant appeal.

When the appeal was called for hearing the appellant appeared in person, unrepresented. The respondent preferred the services of advocate Ally Kasian Mkali.

Submitting in support of his appeal, the appellant firstly prayed to adopt his grounds of appeal and argued that the respondent is not the rightful owner of the suit land. He faulted the trial Tribunal

for basing its decision on the weak evidence. He urged this court to revisit evidence on record.

In reply, advocate Mkali equally prayed to adopt their reply to the grounds of appeal to form part of their submission.

Submitting on the first ground of appeal, he said the respondent witnesses proved that the disputed land is the property of the respondent. He referred to the testimony of PW2, the grandfather of the appellant who testified that he was the one who supervised the mediation between the appellant and the respondent. He said it was initiated that the appellant should compensate the respondent for the damage he caused. Mr. Mkali also referred to the testimony of PW4, Fatuma Saidi Selemani who confirmed that he sold the disputed land to the respondent in 1996. He cemented his argument by citing the provision of the law under **section 110(1) and (2) of the Evidence Act, Cap 6 RE 2022** on the position of the law that *"he who alleges must prove"*. He challenged the assertion by the appellant that he was grabbed his land not to be true because he failed to prove such fact. He insisted that the respondent managed to show how he came to own the land and therefore the argument by the appellant that the respondent's

evidence was weak is irrelevant as the appellant failed to show the weakness. He prayed for the appeal to be dismissed with costs.

In brief rejoinder, the appellant stressed that the respondent took long time to complain.

In this appeal, I shall begin by addressing the second and third grounds of appeal as they are about time limitation. Verily, the issue of time limitation is paramount as it touches the jurisdiction of the matter and in most scenario it supersedes other contested issues. The law i.e., **item 22 of the Schedule to the Law of Limitation Act Cap. 89 R.E 2019** sets limitation to institute a suit for recovery of land to be within 12 years – This position has been emphasised in the case **Yusuph Same & Another vs Hadija Yusuph** (1996) TLR 347.

The question for determination now is whether the suit subject of this appeal was time barred.

The respondent **(PW1)** (applicant at the trial) told the court that he purchased the suit land in 1996 from one Fatuma Said Selemani (PW4). However, the appellant herein trespassed into his suit land for the first time year 2006. They were mediated and it was agreed

that the appellant pay him Tshs. 50,000/- as a compensation and he would then surrender the invaded potion of the land to the appellant. The appellant did not heed to the promise. He reminded him again in 2017 wanting him to vacate the land and took him to the Ward Tribunal where the case was struck out. In February 2018 he instituted a case at the DLHT for Lindi at Lindi. The fact that the respondent instituted a case in February 2018 was confirmed by the appellant himself.

PW2, the grandfather of the appellant testified that he was the one who mediated them and it was agreed that the appellant pay the respondent TShs. 50,000/- but he did not. The same was confirmed by PW3 who was licensed by the respondent to use the land and was the one who informed the respondent about the invasion by the appellant.

To the contrary, the appellant said he acquired the land year 2000 after being allocated the same by the village council.

Nevertheless, the law i.e., **section 9(2) of the Law of Limitation Act, Cap 89 RE 2019** provides as follows:

> *"9(2) Where the person who institutes a suit to recover land or some person through whom he*

claims has been in possession of and has, while entitled to the land, ***been dispossessed or has discontinued his possession the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance***". (Emphasis added).

It follows therefore that according to **section 9(2) of Cap. 89** above where a person is dispossessed from the use of the land, time accrues from the date when such dispossession began. **Section 33(1) of the same Act (i.e., Cap 89)** clarifies further the implication of the above provisions of the law thus:

> *"33 (1) A right of action to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as "adverse possession") and, where on the date on which the right of action to recover any land accrues and no person is in adverse possession of the land, a right of action shall not accrue unless and until some person takes adverse possession of the land."*

The above stance of the law was also underscored by the CAT in the case **Barelia Karangirangi vs Asteria Nyalwambwa** Civil

Appeal No. 237 of 2017 CAT at Mwanza, (unreported) where it was stated that:

> *"The right of action is deemed to accrue on the date of the dispossession of the land in question."*

In this case, there is ample evidence and as acknowledged by the appellant that the invasion or dispossession as claimed by the respondent occurred year 2006. That being the case therefore, right of action deemed to have accrued from 2006 and not year 2000 that the appellant claims to have acquires the disputed land. In calculating from year 2006 to Feb 2018, the respondent instituted a suit against the appellant on the 12th year which is within the 12 years' period to claim land as so provided by the law cited earlier on i.e., **item 22 of the Schedule to the Law of Limitation Act Cap. 89 R.E 2019.** Therefore, the suit was not time barred.

Coming to the remaining grounds of appeal, I shall address them in general. The determination of the same shall be well appreciated by re-visiting the evidence on record in mind of the position that being the first appellate court, I am obliged without fail to re-visit and re-evaluate the entire evidence on record and subject it into objective scrutiny; and if merited arrive to this court's

own findings of fact - **Leopold Mutembei Vs Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017.

Beginning with the claim that the Tribunal did not visit locus to establish the land in dispute while there is contradiction that the respondent said he bought from PW4 eight acres while the area in dispute is 2 acres.

Indeed, the law as it stands, visiting locus in quo is not a creature of any statute but case law. It was clearly stated in the case of **Nizah MH, Ladak vs Gulamal Fazal** [1980] TLR 29 that locus in quo is visited in exceptional circumstances where it is necessary to verify the confusion which arise during the hearing in order to resolve the dispute conclusively. Again in **Dar Es Salaam Water and Sewerage Authority versus Didas Kameka and 17 others**, Civil Appeal No. 233 of 2019, at page 30 (CAT–DSM) held inter alia that:

> *'We think the learned trial judge found it unnecessary to inspect the focus in quo which is not mandatory and as rightly argued by Mr. Kariwa the learned trial judge found the facts and evidence placed before him were sufficient to dispose of the dispute."*

The Court of Appeal discussed the purposes of visiting the *locus in quo* in the **Avit Thedeus Massawe vs Isidory Assenga,** Civil Appeal No. 6/2017, where it stated that

> *"Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained."*

From the above observations of the Court of Appeal, it is clear that the visiting of locus in quo depends on the prevailing circumstance of each case. Mostly where the matter would not be justly adjudicated upon without seeing either the boundaries or size of the land in dispute. From the appellant own assertion and his ground of appeal, the land in dispute is only two acres. This means there is no any contradiction on the evidence adduced by PW4 that she sold 8 acres to the respondent. When PW4 responded to cross examination questions, she said the appellant is using 1 1/2 to 3 acres only of the whole land.

Thus, the evidence is clear that the appellant and the respondent dispute is on two acres only. More so there is no dispute on the

boundaries or location of the said land. That being the position and being guided by the observations of the Court of Appeal above, I find that there was no compelling circumstance for the trial Tribunal to visit locus in quo. This ground of appeal lacks merit and it fails.

The appellant complained also that PW4 testimony was an afterthought and contradictory because she could not remember the year she sold the land to the respondent. PW4 stated that she sold the land long ago hence do not remember the exact year. Nevertheless, PW2 who is the grandfather of the appellant stated clearly that the respondent complained to him about the invasion by the appellant into his suit land in 2006. PW3 testified also that the appellant invaded the suit land which he was licensed to use by the respondent in 2006. PW1 said he purchased the suit land in 1996 and the appellant invaded in 2006.

It is the position of the law that *he who alleges must prove; and that a burden of proof lies on a person who would fail if no evidence at all were given on the other side"* –**section 110(1) and 111 of the Law of Evidence Act, Cap 6 RE 2022.**

It is equally the principle of the law in civil case that the standard of proof is on a balance of probabilities. This simply means that the court shall sustain such evidence which is more credible than the other on a particular fact to be proved.

Again, **section 112 of the Evidence Act, Cap 6 RE 2022** provides that where a person claims existence of a particular fact, the proof of such fact shall lie on that person.

Basing on the above stances of the law in relation to the matter at issue, it goes without say that the appellant had a duty to prove his claim first of which it is my finding that he did. Irrespective of the fact that he did not tender a sale agreement, there was ample and enough evidence to show how he acquired the land. To the contrary, since the appellant specifically claimed that he was allocated land by the Village Government then the legal burden to prove that particular fact was on him of which he did not tender any evidence to that effect.

All in all, what is seen by this court is that while the respondent managed to prove his claim that he is the owner of the disputed land and how he acquired it by calling witnesses; the appellant could neither call any leader from the village government to

confirm that he was allocated the suit land year 2000 nor tender any documentary proof to that effect.

Deriving from the above findings, I find no reason to interfere with the decision of the trial Tribunal.

In the end I find that the entire appeal lacks merit and I dismiss it with costs.

Ordered accordingly.

R.A. Ebrahim
JUDGE

Mtwara
03.05.2023