

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**LAND DIVISION**  
**AT MOSHI**

**LAND APPEAL NO. 51 OF 2022**

(Originating from Land Application No. 19 of 2019 of the District Land  
and Housing Tribunal for Moshi at Moshi).

**EDWARD F. CHUWA ..... 1<sup>ST</sup> APPELLANT**

**ELIZABETH F. CHUWA ..... 2<sup>ND</sup> APPELLANT**

VERSUS

**ERIC MATHEW CHUWA ..... RESPONDENT**

**JUDGMENT**

*24/05/2023 & 23/06/2023*

**SIMFUKWE, J.**

This appeal originates from Land Application No. 19 of 2019 of the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal), in which the respondent herein successfully sued the appellants for trespass into the suit land measuring 101 X 188 metres located at Shirimatunda, Mnadani Ward, Hai district in Kilimanjaro Region. Before the trial tribunal, the respondent herein alleged that he had inherited the said land from his late grandmother one Teresia Mafoi, since 2002. That, the suit land was left with the second appellant as overseer as the respondent was staying in Dar es Salaam. Then, in 2017, the respondent herein discovered that the appellants had conspired and trespassed into the suit land and started to construct a house therein without prior consent of the respondent. In their defence, the appellants herein contested the claims paraded against

them and alleged that the late Teresia Mafoi had allocated her land to her two children, Mathew Chuwa and Francis Chuwa. The trial tribunal found that the allegation of the appellants herein had not been proved while evidence of the respondent was found to have substance. Thus, the dispute was decided in favour of the respondent herein. Hence, the instant appeal.

The appellants have advanced the following grounds of appeal:

- 1. That, the Chairman of the District Land and Housing Tribunal for Moshi erred in law and in facts by declaring that the applicant, the respondent in this appeal is a lawful owner of the land in dispute without taking into consideration the law of limitation.*
- 2. That, the Chairman of the District Land and Housing Tribunal for Moshi erred in law and in facts by declaring that the applicant, the respondent in this appeal is a lawful owner of the land in dispute without considering the evidence adduced by the Appellants and their witness during trial.*
- 3. That, the Chairman of the District Land and Housing Tribunal of Moshi erred in law and in facts by reaching the decision without discussing the issues raised by parties.*
- 4. That, the Chairman of the District Land and Housing Tribunal of Moshi erred in law and in facts in reaching the decision based on the purported Will presented without considering the nature of the dispute in regarding to the validity of the WILL. (sic)*

*5. That, the Chairman of the District Land and Housing Tribunal of Moshi erred in law and in facts in reaching the decision based on the unfound evidence.*

The appellants prayed the appeal to be allowed with costs. The appeal was argued by way of written submissions. The respondent engaged Mr. Julius Semali, learned counsel while the appellants were unrepresented.

The appellants started their submission by narrating the historical background of their dispute. That, this appeal emanates from Land Application No. 19 of 2019 which was consolidated with Land Application No. 18/2019 in which Mr. Joseph Z. Chuwa was the applicant and Land Application No 20/2019 in which Mr. Hamis Chuwa was the applicant respectively. That, the appellants herein were the respondents before the District Land and Housing Tribunal. They alleged that; they have been living on the suit land to date. That, the 2<sup>nd</sup> appellant together with her late husband FRANCIS CHUWA were given the suit land by the late THERESIA MAFOI in 1967 when they got married. That, since the said Francis Chuwa was the last born of the late Theresia Chuwa, he was allocated the land in which their mother was living. It was alleged further that the late Theresia Mafoi gave land to her other child Mathew Mafoi which was near the land allocated to Francis Chuwa his young brother. That, the 2<sup>nd</sup> appellant and her late husband Francis Chuwa built a house, developed their area (suit land) gave birth and raised their children including the 1<sup>st</sup> appellant who is their last born thereat. Francis Chuwa and his daughter, Theresia Mafoi and Mathew Chuwa were alleged to have been buried at the suit land.

The appellants narrated further that the dispute arose when the husband of the 2<sup>nd</sup> appellant (Francis Chuwa) passed away in 1999 when the inlaws of the 2<sup>nd</sup> appellant had an evil motive of chasing her and her family from the suit land. The appellants were sued by the late Theresia Mafoi through power of attorney of Mathew Maurus Chuwa the father of the respondent herein in Civil Case No. 17 of 2001 before Hon. Kitusi-RM (as he then was) at the district court of Moshi. In the said case, the appellants were declared lawful owners of the suit land. Civil Appeal No. 14 of 2003 was preferred against the said decision. The appeal was struck out. Then, in 2019, the respondent herein instituted Land Application No. 19/2019 against the appellants.

Supporting the first ground of appeal, the appellants submitted that the respondent herein was wrongfully declared the lawful owner of the land in dispute as the matter before the tribunal was time barred according to the **Law of Limitation Act, Cap 89 R.E 2019**. That, Part I item 22 of the Schedule of the Act provides for the time to file a suit for recovery of land to be twelve years. They asserted that the respondent herein filed a case before the trial tribunal in 2019 for recovery of land which he alleged to have been given by his late grandmother Theresia Mafoi through a purported Will of 2002. Thus, seventeen years later. That, the 2<sup>nd</sup> appellant testified during the trial that she was given the disputed land together with her deceased husband in 1967 by the late Theresia Mafoi.

The appellants went on to submit that the fact that the trial chairman declared the respondent herein the lawful owner contravenes the law as the respondent herein is barred by the law to institute a case for recovery of a land after expiration of the time provided by the law without any justifiable reason. They made reference to the testimony of the 2<sup>nd</sup>

appellant during the trial which shows that there was a lapse of time from 1967 to 2001 when the appellants were sued for the first time. That, a total of thirty-four years had lapsed, hence, adverse possession of the said land. The appellants were of the view that, that alone proves that the appellants herein are lawful owners of the suit land through adverse possession as the law requires.

It was submitted further that the respondent herein was aware that appellants herein were living on the said suit land when the suit land was given to him through the purported Will in 2002. The appellants cited **section 9 (2) of Cap 89** which provides that time commence to run against the aggrieved party from the time he becomes aware of the dispossession, that is 2002 when he was given the land through the said purported Will. That, the trial Chairman ought to have reasoned out the whereabouts of the respondent when the appellants built two houses on the suit land in 2010 and 2017.

On the second ground of appeal, it was submitted that the trial Chairman in his judgment did not consider the evidence given by the appellants herein and their witnesses. That, the appellants herein testified that they have been living on the suit land from 1967 until when the case was instituted in 2019, which is more than fifty years and seventeen years from 2002 when the respondent claim to have been given the suit land. That, their evidence was corroborated by testimonies of their neighbours. It was averred that the decision which declared the appellants lawful owners of the suit land was never reversed nor appealed against to date. The appellants lamented that; the said fact was never kept into consideration by the trial Chairman who proceeded to declare the respondent herein the lawful owner of the suit land. It was averred further

that the visit at the *locus in quo* of the trial tribunal was not helpful to the appellants as what was gathered from the said visit was not taken into consideration in reaching the decision.

On the third ground of appeal which was consolidated with the fifth ground, it was alleged that during the trial the parties agreed on five issues as reflected at page 2 of the judgment. The appellants were of the view that the trial Chairman did not consider the raised issues while discussing and writing judgment of the case at hand. In support of their allegations, the appellants cited **Regulation 20 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003** which provides inter alia that a judgment should consist findings on the issues. They said that the Chairman reached the said decision without adducing proper legal reasoning of what truly were the points of determination in the suit before the tribunal. That, the judgment as it appears never discussed the raised issues and hence the decision reached is unfounded with no legal reasoning. Also, the appellants believed that the trial Chairman considered evidence of the respondent only and left evidence of the appellants. That, the dispute was decided by using a Will which was not among the raised issues, hence unfounded evidence.

On the fourth ground of appeal, the appellants submitted that the trial Chairman reached the decision based on the purported Will presented without considering the nature of the dispute. That, the matter which was before the trial tribunal was on determination of ownership of the land and not on validity of the Will. Reference was made to **section 3 (1) of the Land Disputes Courts Act, Cap 216** which provides that:

*"... every dispute or complaint concerning land shall be instituted in the court having jurisdiction to determine land disputes...."*

The appellants were of the opinion that the matter before the tribunal was a land case and not probate case. That, evidence adduced during the trial revealed that there was neither minutes which gave the respondent the suit land nor division of the properties as there was no clan or family meeting which was convened since the death of Theresia Mafoi. It was asserted that the case is probate in nature, hence the respondent lacks legs to stand because there is no probate case filed in court appointing him to be the administrator of the estate of the late Theresia Mafoi nor probate Form No. 5 and 6 showing that the respondent was given the suit land. That, the Will which was used by the trial Chairman in reaching the decision is the same Will which was disregarded by the district court in Civil case No. 17/2001. The appellants proposed that it could be legally correct if this matter could be filed as probate case to determine the validity of the said Will before instituting a land case.

It was the prayer of the appellants that the judgment and decree of the trial tribunal be quashed and set aside and the appellants be declared the lawful owners of the suit land with costs.

Opposing the appeal, Mr. Julius Semali learned counsel for the respondent had a different version of the story. He contended that the suit land was initially owned by the late Theresia Kamili Mafoi who gave it to her grandsons: Eric Mathew Chuwa, Hamis Chuwa and Joseph Z. Chuwa before her death. That, the grandsons have been using the suit land peacefully for residence and activities since 2002 until 2017 when the appellants encroached the suit land.

Replying the first ground of appeal, Mr. Semali submitted that, it is a matter of principle that any person seeking to acquire title to land by adverse possession has to cumulatively prove that: there was abandonment; the adverse possessor had been in actual possession of the piece of land and had no colour of right to be there other than his entry and occupation; the adverse possessor had openly and without consent of the true owner done acts which were inconsistent with the enjoyment by the true owner for purposes for which he intended to use it; there was sufficient intention to dispossess; the statutory period of limitation of twelve years have lapsed without interruption in between; and the nature of property was such that adverse possession would result. On the basis of the conditions for adverse possession, the learned counsel stated that in the present case the 2<sup>nd</sup> appellant claimed to be the owner of the suit land after being granted by the late Theresia Mafoi in 1967. Thus, the issue of adverse possession cannot arise. He cemented his argument with the land mark case of **Registered Trustees of the Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016**, Court of Appeal of Tanzania at Arusha (unreported), in which it was held that:

*"In the situation at hand, the respondents sought to establish that their right to adverse possession is derived from the original owner in the form of permission or agreement or grant. Such is, so to speak, not adverse possession. Possession could not be adverse if it could be referred to 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 and in denial of the true owner of the premise.”*

In conclusion of the first ground of appeal, it was reiterated that the respondent herein testified at the trial tribunal that he was residing at Dar es Salaam when he permitted the appellants to use the suit land. Thus, the appellants were merely licensee, hence they cannot claim the ownership of the suit land by adverse possession.

In response to the second ground of appeal, it was submitted that evidence of the appellants together with their witnesses was considered by the tribunal Chairman at the time of composing judgment. That, after analysing the evidence of the appellants, the trial tribunal Chairman found that their testimonies were weak compared with the respondent's evidence concerning ownership of the suit land. That, the respondent managed to tender documentary evidence (exhibit P1) which proved his ownership of the suit land. Mr. Semali alleged further that, the said Will (exhibit P1) was witnessed by clan leaders together with local government leaders and Notary public. That, the said Will has never been challenged or revoked by any court.

Concerning Civil Case No. 17 of 2001 (exhibit D1), Mr. Semali stated that the same was not relevant to the present case because the suit land in the said case is different from the present suit land. That, no evidence was adduced to prove that the disputed land in Civil case No. 17/2001 was the same in Land Application No. 19/2019. Also, the learned counsel for the respondent challenged the allegations that the appellants stayed over the suit land since 1967 as they were residing beside it while the suit

land was being possessed and used by Teresia Mafoi since 1967 until 2002.

On the third and fifth grounds of appeal, which concerns failure to discuss the raised issues, Mr. Semali replied that based on the scenario/version of the case the essential issues for determination of Land Application No. 19 of 2019 were: Who is the lawful owner of the suit land and to what relief the parties are entitled to. He was of the view that the two issues were enough for disposal of Land Application No. 19/2019 while the remaining issues were of no legal importance for resolving a land dispute.

Regarding the *locus standi* of the respondent, it was replied that the same is purely matter of law which goes to the root of the case and jurisdiction of the trial tribunal to entertain the case. That, it was improperly framed as an issue for determination as it does not require evidence as a matter of law. That, it can be disposed by considering the pleadings alone in line with legal position.

On the fourth ground of appeal which is in respect of the trial tribunal basing its decision on a Will, Mr. Semali submitted that the forum which has jurisdiction to deal with validity of the Will is the Probate Court and not the trial tribunal. That, the dispute before the trial tribunal was on ownership of land and not on the validity of the Will. That, the Will was tendered and admitted at the trial tribunal to prove the respondent's ownership of the suit land. That, the said Will had never been challenged in any court, thus remained as a legal proof of the respondent's ownership of the suit land. Furthermore, the findings and reason of the trial Chairman were on ownership of the suit land.

The learned counsel for the respondent prayed this appeal to be dismissed with costs for lack of merit.

In their rejoinder, the appellants submitted among other things that, the submission of adverse possession of the respondents is wrong as the disputed land was given inter vivo by the said Theresia Kamili Mafoi to his two sons Francis and Mathew Chuwa. That, the dispute over the suit land arose in 2001 between Theresia Mafoi and the appellants whereby the purported Will was rejected.

On other contested issues, the appellants reiterated their submission in chief. Concerning abandonment of issues, the appellants submitted that reasons for abandoning issues have to be given by the one who composed the said judgment and not by the parties to the case as done by the respondents in their submission.

I have considered the grounds of appeal, submissions of both parties and the records of the trial tribunal. The issue for determination is **whether this appeal has merit.**

For the sake of relevance and interest of justice, I wish to start with the second and third grounds of appeal which fault the trial tribunal for failure to consider evidence of the appellants and the raised issues. The appellants were of the view that their evidence was not considered in reaching at the decision of the trial tribunal, while the learned counsel for the respondent submitted that evidence of both parties was considered and that evidence of the respondent was found to be heavier than that of the appellants.

It may be noted that the second and third grounds of appeal concern contents of a judgment which are prescribed under the law. **Regulation**

**20 (1) (a) to (d) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations G.N No. 174 of 2003** provides that:

*"The judgment of the Tribunal shall always be short, written in simple language and shall consist of;*

*a. A brief statement of facts*

*b. Findings on the issues*

*c. A decision and*

*d. Reasons for the decision."*

I have examined the judgment of the trial tribunal, after the trial Chairman had summarized the evidence of both parties, at page 4 and 5 he narrated the visit to the locus in quo briefly, referred the opinions of assessors, then proceeded to record his findings without referring to the raised issues vis a vis the adduced evidence.

In the case of **Sheik Ahmed Said versus The Registered Trustees of Manyema Masjid [2005] TLR 61** the Court of Appeal of Tanzania at Dodoma while emphasizing this principle held that:

*"It is necessary for a trial court to make a specific finding on each and every issue framed in a case even where some of the issues cover the same aspect."*

In the case at hand, as already noted herein above, the learned trial Chairman reached at his decision without referring or making a specific finding on any framed issue. He made an over all finding which unfortunately did not resolve all the framed issues. The first issue was in respect of *locus standi* of the respondent which is a point of law. Failure to determine such issue goes to the root of the case which is fatal.

On the strength of the cited case law of the Court of Appeal, it is settled that the remedy for the judgment which is not properly composed, is for the case file to be remitted back to the trial court for the trial magistrate/chairman to recompose the judgment. It is in the same sense that, I hereby order the case file to be remitted back to the trial Chairman for recomposing judgment pursuant to the law.

Appeal partly allowed with no order as to costs.

Order accordingly.

DATED and DELIVERED at Moshi this 23<sup>rd</sup> day of June 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

**23/6/2023**