IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 17 OF 2022

(Arising from Land Application No. 140 of 2019, of the District Land and Housing Tribunal for Mara at Musoma)

NYAMBARYA WARATI

(Administrator of the Estate of the late

WARATI NYAMBARYA)..... APPELLANT

VERSUS

CHARLES KILENGA..... RESPONDENT

JUDGMENT

10th May & 14th July 2023
F. H. Mahimbali, J.

The appellant and the respondent are at a tag of war on ownership of parcel land each claiming to have inherited from his fore father. Whereas the appellant claims the land to be owned by the late Warati Nyambarya who is his father who also inherited from his father Nyambarya from 1940s. It is undisputed that the appellant's father died in 2002.

The respondent on the other hand, claims ownership of the same land from his father, the late Kilenge Kunurya who died in 1984 and that the said Kilenge Kunurya had been given by the late Warati Nyambarya during his life time. It is therefore undisputed that the respondent's father traced ownership of the said land after being given by the appellant's father.

Upon scrutiny of the evidence in record and the assessors' opinion, the trial tribunal ruled in favour of the respondent reasoning that the appellant's evidence is short of merit compared to that of the respondent and that there is none of his siblings and clan members who gave corroborating evidence in his claims. To the contrary, the respondent's evidence is deep and sufficient warranting his lawful possession and ownership of the said land.

Aggrieved by the said decision, the appellant has tossed his chance before this court armed with a total of seven grounds of appeal, namely:

1. *That the trial tribunal erred in law and fact for failure to make analysis of the evidence tendered by the appellant who have strong and heavier evidence than the respondent.*
2. *That the trial tribunal erred in law and fact for making personal observation which is not reflected on record.*

3. *That the trial tribunal erred in law and fact for disregarding the testimony of the appellant and exhibits and rely on the false evidence of the respondent.*
4. *That the trial tribunal erred in law and fact for failure to observe that the dispute arose on 2014 after the former administrator of estate of late WARATI NYAMBARYA the late Hassan Biganio gave the dispute land to the respondent.*
5. *That the trial tribunal erred in law and fact for not taking initiative of visiting the locus in quo to determine the reality of dispute land in order to reach fair and just decision.*
6. *That the trial tribunal erred in law and fact to declare the respondent as legal owner of dispute land without any proof.*
7. *That the trial tribunal erred in law and fact for delivering a judgment in favor of the respondent without taking into account that the respondent's witness Kisika Nyambarya are relatives and both invaded the dispute land.*

During the hearing of the appeal, the appellant appeared in person whereas the respondent had a representation of Mr. Makowe, learned advocate.

On his part, the appellant had nothing more to add but just prayed that his grounds of appeal be adopted to form part of his appeal submission and thus prayed that this court to overturn the decision of the trial tribunal and declare him the lawful owner of the disputed land as claimed at the trial tribunal.

On the other hand, Mr. Makowe for the respondent resisted the appeal, considering it unworthy of any legal consideration. In arguing the appeal, he clustered the appellant's 1st, 3rd, 6th, and 7th grounds of appeal into one contending that they all talk of facts. The 2nd and 5th grounds of appeal he argued them separately.

Submitting in the 1st, 3rd, 6th and 7th grounds jointly, Mr. Makowe was of the view that as per evidence on record and as rightly reasoned by the trial chairperson in his judgment, it is clear that the appellant's evidence is very brief and unsatisfactory to grant him verdict as wished in comparison with the respondent's evidence. He even challenged the minutes of the clan meeting as also denouncing him ownership of the said land.

With the 2nd ground of appeal, he attacked the alleged personal observations of the trial chairperson as not established by the appellant. otherwise, he considered the said ground of as baseless. What mainly the trial chairperson did in his judgment is reasoning on the strength of the appellant's evidence against that of the respondent.

The reasoning is simple, if the appellant's father died in 2002 while the respondent's father died in 1984 and the dispute arose in 2014, that suggests, the land dispute arose 30 years later. He contended that if the

appellant's father did not claim it during his life time (from 1984 to 2002), who is the appellant to claim it in 2014. The argument that the appellant has been in use of the said land since 2002 it is not supported by any evidence, argued Mr. Makowe.

He added that, since there was former administrator of the estate of the appellant's father between 2002 to 2014 who didn't claim the said land as the deceased's property, where does he get the justification to claim the land that was not in dispute formerly? He contended further that, in his considered view, the appellant though legal administrator is only justified to proceed from where his former administrator ended and not to unearth what was not a dispute by that time. Doing otherwise is like inventing the wheel which is not right.

On this, it was concluded that what the appellant is claiming is not justified and valid. In any case, if it were valid, it is time barred as the cause of action never survived the deceased.

On the fifth ground of appeal that the trial chairperson never visited the locus in quo, thus made a legal error, is not legally justified. He argued that in his considered view, not visiting the locus in quo has never been unlawful in law if the material evidence presented at trial are satisfactory to describe the land in dispute. The rationale is simple, a

court of law only decides on evidence presented before it and not on evidence fetched by the court itself.

On these submissions, Mr. Makowe prayed for the dismissal of the appeal with costs as it is baseless.

In his rejoinder submission, the appellant insisted that his appeal is merited and that this court should circumvent the whole of the appellant's case and the trial record as a whole; and upon digest, the court will come to its own findings differently from the trial tribunal. He rested his appeal case while praying that it be allowed with costs.

I have had sufficient time to go through the appellant's evidence at the trial tribunal to assess its strength. I better reproduce it:

> *"Eneo lenye mgogoro ni la baba yangu Warati Nyamabarya aliyelipata kutoka kwa wazazi wake mwaka 1940. Baba yangu alifariki mwaka 2002. Warati alipofariki aliacha maeneo yake yakiwa wazi. Mjibu maombi alivamia eneo hilo mwaka 2014. Familia yetu ilikaa kikao cha ukoo na kuniteua mimi kuwa msimamizi wa miarathi. Tukataka mjibu maombi kupisha hilo eneo. Akakataa akidai kwamba eneo hilo ni la baba yake. Baadae ndio nikachukua hizi jitihada za kufungua shauri. Naomba kutoa vielelezo vyangu (Muhtsari wa kikao cha ukoo na form na.4). Huo ndiyo Ushahidi wangu.*

His documents (minutes of the clan meeting and form no.4) were collectively admitted as exhibit P1. After the cross examination, the appellant closed his case.

On the other hand, the respondent testified himself and had more witness in support of his evidence. His testimony is to the extent that he had inherited the said land from his deceased father who had died in 1984. That their father had obtained the said land from the appellant's father in 1958. That he himself was born in 1969 in the said land and has been in use since then. His testimony goes this way in his own words:

> *"....Nimezaliwa mwaka 1969. Baba yake na mdai alikua ameoa shangazi yangu. Hivyo ninahusiana na mdai. Mimi sijavamia eneo la mdai. Eneo hilo mimi nilirithi kutoka kwa baba yangu mwaka 1984, baba yangu alipofariki. Mimi tangu nizaliwe mwaka 1969, nimeishi hapohapo kwenye eneo la mgogoro nikilitumia kwa makazi na kulilima. Baba yangu alilipata eneo hilo kwa kupewa na shimeji yake aitwae Warati Nyambarya mwaka 1958. Baada ya hapo, baba aliendelea kulitumia hilo eneo mpaka alipofariki mwaka 1984 na akatuachia hilo eneo. Hivyo eneo lilikua la Baba yangu Kitenge Kunulya. Warati alifariki mwaka 2002. Mgogoro huu umeanza mwaka 2014 niliposhitakiwa katika baraza la kata. Mwaka 2019 nikaletewa samansi kuja hapa. Mimi ninaliomba baraza hili kuitupilia mbali kesi hii na pia nilipwe gharama za kesi.*

His testimony is supported by the evidence of his witness SU2 – Kisika Nyambarya Warati, who claimed to be cousin to the appellant. Though he didn't state how he witnessed the said granting in 1958 as he is only 47 years old when he testified in 2022. Nevertheless, he acknowledged seeing the respondent using the said land until 2014 when this dispute arose.

Upon scrutiny of the evidence on record, the important question now is whether the appeal is meritorious as per evidence on record.

At the trial tribunal, two issues were preferred as compass bearing in determining the case, namely: who is the rightful owner of the disputed land between the disputants and what are the reliefs.

I have thoroughly traversed the trial tribunal records on the evidence given and the arguments by both parties at the appeal level. With the 1st, 3rd, 6th and 7th grounds jointly submitted, I am of the view that the appellant's concern on the weighty of evidence falls short. It falls short on the sense that, had there been evidence by him that the respondent's father was just a mere invitee, the argument of him inheriting the said land could fall short of sense as an invitee to land never acquires possession of it but only accrues the right of use at the pleasure of the owner. Since there is ample evidence of continuing use

of the said land by the appellant after the demise of his father in 1984, had the late Warati Nyambarya intended to disown the respondent's father from possession of the said land, he would have rightly done so immediately. Not doing that, the appellant purporting now to be an administrator has no right of action against the land his father had freely given to the respondent's father. Furthermore, the appellant's father having died in 2002 and the respondent continuing using the said land from then to 2014, it does not click into mind that the respondent invaded the appellant's land. In any essence, as rightly argued by Mr. Makowe that the appellant's claim cannot now be valid as it is time barred and that the cause of action never survived the deceased.

The law is settled that, he who claims must establish. Short of that the suit must fail on his part. When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner (**see section 119 of the Evidence Act, Cap 6 R.E 2022**).

I am abreast to the rule of the law of evidence under Section 119 of the Evidence Act, Cap 6Z RE 2002 that:

"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who assert that he is not the owner"

The essence of this legal point has been commented by M.C.Sarkar and S.C. Sarkar in Sarkar's Law of Evidence in India, Pakistan Bangladesh, Burma & Ceylon, at page 2003, 17th Edition, volume 2 that:

"This section embodies the well-known principle that possession is prime facie evidence of ownership. Possession of property movable or immovable, affords prime facie presumption of ownership as men generally own property they possess. Possession is a good tittle against anyone who cannot prove a better [tittle)".

Fitting the above comments by the scholars and the position of our law with the facts of this case, it is obvious that the appellant had a duty to prove that the respondent's father (now the respondent) who was in possession of the disputed land for all those years was not an owner of the disputed piece of land, hence the encroachment claims against the respondent. The respondent told the trial tribunal how his father got that land from the appellant's father in 1958. They have been using it peacefully during the whole lifetime of his father and the appellant's father who the latter died in 2002.

In a close digest of the appellant's case at trial tribunal and the legal principle cherished in the case of **Hemed Saidi V Mohamed Mbilu** [1984] T.L.R 113 at page 116 that a person whose evidence is heavier than that of the other is the one who must win. I fully subscribe to the said position. Further, I am also of the stance that in measuring the weight of evidence, it is not a number of witnesses that matters but rather the quality of evidence. That being the position, the appellant has failed to prove what was required of him from the facts that he asserted existed.

With the second ground of appeal, I have failed to grasp the relevant material how the trial chairperson made personal observation in the case which is not reflected in the evidence. The reasoning of the trial chairperson is simple, if the appellant's father died in 2002 while the respondent's father died in 1984 and the dispute arose in 2014, that suggests, the land dispute arose 30 years later. He reasoned if the appellant's father did not claim it during his life time (from 1984 to 2002), who is the appellant to claim it in 2014. The argument that the appellant has been in use of the said land since 2002 is not supported by any evidence, as per record. Thus, this ground of appeal equally fails.

Equally, there is no evidence in record that the respondent's land was given to him by one Hassan Bigando, the former administrator of the estate of the late Warati Nyamabarya in which the appellant now assumes administration in succession. Even if that was done and during his lifetime, the right cause was for the appellant to sue the administrator for misappropriation of administrator's duty and not otherwise as opted.

On the fifth ground of appeal that the trial chairperson never visited the locus in quo, thus made a legal error, is not legally justified. I agree with the contention that not visiting the locus in quo has never been unlawful in law if the material evidence presented at trial satisfactorily describe the land in dispute. The rationale is simple, a court of law only decides on evidence presented before it and not on evidence fetched by the court itself. As to when the court can pay visit to the locus in quo, was well stated in the case of **AVIT THADEUS MASSAWE V. ISIDORY ASSENGA, Civil Appeal no. 6 of 2017, CAT** at Arusha emphasised when should court visit to the locus in quo that only when it is necessary to do so for purposes of clearing some important legal doubts circumventing the case for the interests of justice. On this, the emphasis on a visit to a locus in quo it was quoted the decision by the Nigerian High Court of the Federal Capital Territory

in the Abuja Judicial Division in the case of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others,** Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the *locus in quo*. The factors include:

1. *Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see* ***Othiniel Sheke V Victor Plankshak*** *(2008) NSCQR Vol. 35, p. 56.*

2. *The essence of a visit to locus in quo in land matters includes* ***location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land*** *(see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p.263.*

3. *In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see Ezemonye Okwara Vs. dominic Okwara (1997) 11 NWLR (Pt. 527) p. 1601).*

4. *The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. (Emphasis added).*

In the above cited case, the applicant was seeking the court and the parties in the suit to visit the *locus in quo*. In its ruling the Court relied on the decision in the case of **Akosile Vs. Adeye** (2011) 17 NWLR (Pt. 1276) p. 263 which summarized the above factors thus:

> *"The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries."*

In the current case, there was no such evidence available to necessitate the visit of locus in quo by the trial tribunal as discussed above.

Accordingly, I find that the respondent's evidence weightier than that of the appellant. At the end result, I dismiss the appeal with costs and uphold the decision and findings of the trial Tribunal.

DATED at MUSOMA this 14th day of July, 2023.

F.H. Mahimbali

Judge

Court: Judgment delivered today the 14th of July, 2023 via teleconference in the presence of appellant and in the absence of respondent.

Right to further appeal explained.

F. L. Moshi,
Deputy Registrar