IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

LAND APPEAL CASE NO. 7 OF 2022

(Originating from Application No. 4 of 2020 in the District Land and Housing Tribunal of Rukwa at Sumbawanga)

ROICE CHUNJI.....APPELLANT

VERSUS

NELI MBWILO .....RESPONDENT

JUDGMENT

MWENEMPAZI, J:

The appellant is aggrieved by the decision of the District Land and Housing Tribunal of Rukwa delivered on 16th February, 2022 (Hon. J. Lwezaura, Chairman). In that application the appellant filed a complaint against the respondent claiming that the respondent had trespassed into her land. She prayed for orders of the trial tribunal that the applicant(appellant) is the lawful owner of the dispute land and that the respondent should leave vacant possession of the dispute land. After the matter had been heard by parties, the trial tribunal decided that the Respondent is a lawful and rightful owner

of the dispute land and therefore the application was dismissed with costs. The appellant is aggrieved by the decision of the District Land and Housing Tribunal; she has filed this appeal raising six grounds of appeal. The said grounds of appeal are as follows:

1. That the trial Chairman erred in law and fact to find that the appellant failed to prove her case to a required standard and decided in favour of the respondent without considering all the evidence given on her part in comparison with that of the respondent with(sic) did not at all prove in any manner the fact asserted by her that his husband purchased that land from the appellant's husband. Copy of the decree and judgement attached.
2. That the trial tribunal chairman erred in law and fact to act on wrong belief and decide in the respondent's favour basing her decision on adverse possession without considering the appellant's unrefuted fact that the respondent's possession of that land however long may be, it was a permissive one to the sense that the respondent was an invitee one.
3. That tribunal chairman erred in law and fact for her failure to analyses properly the evidence given on both sides and find out as to which

area of the land belonged to decree holder between the area covering more than eight (8) acres asserted by the appellant and that of 4 acres asserted by the appellant and so what area was it under the decree.

4. The trial tribunal chairman erred in law and fact to allow and act upon the evidence of DW2 and 3 who had fraudulently appeared and give evidence as w and different persons while was one and the same person.
5. That the trial chairman erred in law and fact to ignore and disregard the appellants final submission and deliberated not making any comment over it in her judgement.
6. That the Judgement and decree under this appeal was delivered by the District Land and Housing Tribunal for Rukwa on 16/2/2022 so within the court's jurisdiction.

The appellant, relying to the grounds of appeal which have been reproduced herein above, has prayed that the appeal be allowed with costs; the respondent be evicted from the dispute land; a permanent injunction be issued restraining her, her relatives, employees' agents or any one coming through her name from entering the dispute land; and, that Tshs. 5000/-

daily compensation for continued occupation and use of the land from the date of the judgment up to the day of vacating the same.

At the hearing of the appeal, the appellant was being represented by Mr. Baltazar Chambi, learned Advocate and the Respondent was being represented by Mr. Deogratias Sanga, learned advocate. Hearing proceeded viva voce.

Mr. Chambi, learned Advocate for the appellant commenced submitting on the appeal by stating the intention of an appeal is to challenge the decision of the District Land and Housing Tribunal (DL&HT). He submitted that the appellant has raised six (6) grounds of appeal and they intend to submit on all of them on the trot as arranged in the memorandum of appeal.

On the 1st ground the counsel submitted that the appellant was complaining on the trespass of 8 acres of land by respondent; knowing that she has a duty to prove, she brought two witnesses and herself.

Her evidence is based on ownership of land. The appellant's husband was a friend to the respondent's husband. The respondent's husband went to the appellant's husband praying for land. The appellant and her husband allowed respondent's husband to have a piece of land (8 acres) but with

condition that they should not develop with permanent structure. The respondent's husband used the land without permanent structures until when he died. The appellant's husband died first and later the respondent's husband.

In 2019, the appellant saw the respondent developing the land by planting permanent trees. The appellant blocked the respondent. Also, claimed the land as she was now breaching the condition.

The respondent refused on allegation that respondent's husband bought the land by paying 10 bags of manure. That brought in a dispute hence an application in the District Land and Housing Tribunal (DL&HT). appellant's evidence was supported by testimony of other two witnesses.

In the Written statement of Defence (WSD) of the respondent said the respondent's husband bought that area of land by 10 bags of manure. In attempt to prove the allegations the respondent brought 4 witnesses and herself.

It was the argument by the appellant that the respondent did not bring any evidence to show her husband bought that land by paying 10 bags of manure. The respondent said she was absent when the husband was

purchasing. There was no any writing. No any person who witnessed the sale who was brought to testify on the alleged sale.

The witnesses who were brought testified on another issue. They said the respondent's husband allowed them to cultivate the farm; with that evidence, the District Land and Housing Tribunal (DL&HT) chairman disregarded the evidence that the respondent's husband purchased the land and shifted to a long use of the dispute land. The Counsel for the appellant has argued that the fact of long use of land was not pleaded.

Order VI Rule 7 of Civil Procedure Code, Cap. 33 R.E.2022 provide the Court will not entertain any fact which was not pleaded. It is a legal stance of Courts in Tanzania, as in **Hood Transport Co. Ltd Vs. East African Development Bank, Civil Appeal No. 262 of 2019, Court of Appeal of Tanzania at Dar es Salaam** at page 14, that:

> *"In principle when the Court is invited to determine an issue, the same must be featured in the pleadings, hence the famous and well settled legal position that parties are found by pleadings whose proof is cemented by the evidence adduced".*

The counsel for the appellant submitted that it was wrong to decide the way he did, there was no evidence to be strengthened.

On the 2nd ground the counsel submitted that the decision was based on adverse possession without considering the appellant's unrefuted fact that the respondent's possession of the land however long may be, it was based on permission by the appellant. The respondent was an invitee.

The decision of the trial tribunal was wrong; in the case of **Ramadhan Makwega Vs. Theresia M. Mshuza, Misc. Land Case Appeal No. 3 of 2018** (page 2):

> *"The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile open and motorius".*

In this case, the respondent was invited. There was permission. In the case of **Mukyemalila & Thadeo Vs. Luilanga [1972] HCD 4**:

> *"An invite cannot establish adverse possession against host even if the invitee had made the permanent improvement".*

In the case of **Angelo G. Kapufi Vs. Edward Matondwa & 2 Others**, **Land Appeal No. 30 of 2019:**

> *"An invitee has no good title to transfer to another person".*

The appellant prayed that the appeal be allowed with costs, respondent be evicted from the land and issue an order for permanent injunction and payment of compensation of Tshs. 5000/= every day from the date of the decision.

In response to the submission in chief by the counsel for the appellant, Mr. Deogratius Sanga, Advocate for the respondent submitted that they will not respond on ground 6 ground; ground 1, 2, 3 will be submitted together and the rest.

On the first set of grounds of appeal, in awareness of section 110 of Law of Evidence and that parties are bound by pleadings. The cases **Hood Transport Co. Ltd Vs. East African Development Bank, (supra), Registered Trustee of Archdiocese of Dar es Salaam Vs. Sophia Kamani**, Civil Appeal No. 158 of 2015 at page 10. The counsel submitted that the chairman of the District Land & Housing Tribunal (DL&HT) was right

to decide the way he did basing on evidence by respondent and other witnesses. The respondent explained how she obtained ownership of land through her husband. Basically, the respondent's witnesses did testify how they came into ownership of the land.

Also, the evidence by respondent is supported by the appellants' evidence, page 7 of proceedings. The witness showed that she was aware, but was contesting that she was not involved in the sale.

Also, PW2 testified at page 9 that she is aware of the presence of the document purchasing the land. The contest is that they were not involved.

In the application, the dispute land is at Isesa but PW2 and PW3 say the dispute area is at Majumba Sita. Also, it is not pleaded that the respondent is an invitee. Moreover, the evidence is very contradicting on serious issues. PW1 at page 8 – 9 admit not to know where the husband purchased PW2 has testified at page 11 that his father obtained by inheritance from forefather. PW1 doesn't know when her husband lent the farm to the respondent's husband. PW2 testified that both were present.

The respondent proved how she obtained the land and her right to use the land for the whole period. It was thus proper for the chairman to give right

to the respondent. In the case of **Hemed Said Vs. Mohamed Mbini [1984] TLR 113.** It was held that:

> *"according to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".*

The argument against adverse position is merit less. The counsel for the respondent has stated that they have opinion that it was right. Though not directly but it was pleaded when the respondent prepared a written statement of defence (WSD).

It is seen that the principle was mis-applied due to the nature of the evidence. The counsel argued that even if the Court would agree the principle was mis-applied, they are praying this court to revisit and see that it was proper to decide in favour of the respondent.

The counsel for the respondent submitted that they are fully aware to the positions of the decisions of the Courts on adverse position. However, in the circumstances, the positions are distinguishable. In all cases referred, the parties were proved to be invited. In this case it has not been proved that

the respondent was invited. But she acquired the land by purchase and she has proved how she has been using the land.

On the 4th ground of appeal, the argument that DW2 testified twice is not true. The counsel has misled himself. It is a mere slip of pen in writing.

In the trial Tribunal SU2 is Afikile Kibona. SU3 is Elizabeth Sanga. The repetition of names of Afikile Kibona as SU3 is a mere slip of pen and not intended to testify twice. He invited this Court to invoke an overriding principle and dwell on merit of the case.

On the 5th ground of appeal; that the final submission was not considered. I argue that it is not a legal requirement but the counsels submit to influence the Court. He submitted as parties we are not sure whether it was considered or not.

In conclusion, the size of the disputed land when reading proceedings, I met the same and similar issue. The evidence adduced did show the dispute land has a size of 8.5 acres – 10 acres. This question required visit to the *locus in quo.*

In the case **Avit Thadeo Massawe Vs. Isdori Asenga, Civil Appeal No. 6/2017, Court of Appeal of Tanzania at Arusha** the issue of uncertainty of size would have attracted visit of the area if this Court will find that it is proper to visit the *locus in quo*. In this regard the counsel for the respondent invited this court to consider Order XXXIX Rule 27(1) (b) and (2) of the Civil Procedure Code. The counsel prayed that the appeal be dismissed in its entirety and uphold the decision of the District Land and Housing Tribunal (DL&HT) because in their view the decision was proper. The appeal should be dismissed with cost.

In rejoinder Mr. Chambi learned Advocate the appellant stated that it is very sad the counsel did not understand pleadings vis a vis proceeding. I have understood that the counsel admit that the fact of adverse possession was raised in proceedings.

If the respondent bought the land where is the documentary evidence. Where the party allege purchasing, the issue of adverse possession cannot rise. You cannot have right due to purchase and then own by adverse possession.

The one who asserted the fact of purchase must prove. The appellant admits the respondent's husband was invited. The witnesses for the appellant said when the respondent was invited, they were present. The evidence to work on is that tendered in the District Land and Housing Tribunal (DL&HT).

The respondent has been pleaded as a trespasser. It is true. She is developing contrary to the condition of invitation.

There are contradictions of dates the issue is possession of the Land. The location of the dispute land, is at Isesa. Isesa is a ward, Ilela area. It is in Isesa thus, one thing.

Evidence must cement pleadings. The counsel has alleged slip of the pen. That is not slip of the pen. Those people are present.

G.N. 174/2003 Regulation 14 provides for submission to be given after production of evidence. Parties prayed to file written submission after we had noted the anormally. The counsel for the appellant prayed the decision of the District Land and Housing Tribunal (DL&HT) be quashed. The issue is trespass. Other issues won't resolve the dispute.

The counsel also submitted that the provisions cited by the counsel inviting this Court to visit locus in quo are baseless; they won't resolve the dispute.

He therefore pray this Court find that the appellant proved her case but due to the faults they have pointed out, they pray this appeal be allowed as prayed in their submission in chief.

I have heard the submission by the parties and also read the record of the trial Tribunal. The issue for consideration is whether the appeal has merit as prayed by the appellant.

This being the first appeal, the Court has a power to re-assess the entire evidence and arrive at its own independent conclusion. In the case of **Justus Ntibandetse Vs. CRDB PLC,** Misc. Civil Application No. 41 of 2021 High Court of Moshi (Sunfukwe, J) it was observed while citing the case of **Paulina Samson Ndawavya Vs. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 that:

> *"The duty of the trial Court to evaluate evidence of each witness and make findings on issues. The function of the first appellate Court is to re-appraise (re-assess) the evidence on the record and draw its inferences and*

findings having regard to the fact the trial Court had advantage of watching and assessing the witnesses as they gave evidence".

The counsel for the appellant has summarized the events as narrated by the witnesses for the appellant during trial that the respondent was an invitee on the dispute piece of land (8 acres) which invitation was a result of request by the respondent's husband. That fact was testified and confirmed that the respondent's husband borrowed the piece of land from the appellant and her late husband. That is according to PW1, PW2 and PW3.

The respondent in her evidence testified that the dispute area was bought by her husband and then he showed the same to her. In her knowledge, the area has four (4) acres. The purchase is by payment of 10 bags of manure.

In the testimony by witnesses Afilati Kibona (SU2) as well as su3. In the two instances the witness has testified showing that they are two different persons. Essentially the evidence depicts the respondent's husband as Gadau and in the latter case as SU3 Mkinga. He is shown to be a person

who gave land to the witness so that they can cultivate crops. That happened in 1988.

All be it, the trial tribunal decided in favour of the respondent based on the long use of the dispute land. In essence, the respondent and the trial tribunal agreed to the possession by adverse possession.

The counsel for appellant has argued that since adverse possession was not pleaded, the Court cannot rely on the point to determine the issue of ownership. The evidence however shows that the respondent's husband when he went asking for land from the appellant and her husband he was alone and that is confirmed by the appellant who testified as PW1, Nazar Bilauli Simtengu (PW2) and Gaudioza Bilauri (PW3). It is clear that since Gadau borrowed the farm on the basis of friendship, it is reasonable that the respondents was not involved. Although he used the land for long time it cannot legally be right to rely an adverse possession under the circumstances and holding in the case of **Mukyemalila & Thadeo Bs. Lutanga [1972] HCD 4** must stand. The same holds that:

"An invitee cannot establish adverse possession against host even if the invitee had made the permanent improvement".

Also, it is my opinion that, the fact that there are witnesses who were allowed to farm in the dispute land, cannot justify ownership by the respondent.

I have also perused the record, the application and written statement of defence. It is not pleaded in the written statement of defence that the respondent purchased the dispute farm nor is there the allegations of long use. As parties are bound by their pleadings, it was wrong in my view to rely on adverse possession as the base of decision on ownership as the respondent's husband was an invitee.

At trial tribunal, if we look at the evidence as a whole, we cannot conclude that the respondent is the rightful owner of the dispute land based on adverse possession where the evidence leans on purchase by 10 bags of manure which has not been proved and the appellant's claim to have invited the respondent's husband, as confirmed by PW1, PW2 and PW3.

Under the circumstances, I find the appeal has merit and therefore the same is allowed. The respondent should leave vacant possession of the dispute

farm to the appellant and therefore is hereby permanently restrained herself or her agents, employees and or relatives from use of the dispute farm. I further order that if the respondent fails to leave vacant possession of the land then she will be liable to pay compensation to the appellant as prayed, at the time of Tshs. 5000 per day until the date of vacating the same.

It is ordered accordingly.

Dated and signed at **Sumbawanga** this 20th day of July, 2023.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

T.M. MWENEMPAZI

JUDGE