IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 9 OF 2023

(Arising from District Land and Housing Tribunal Babati Land Application No. 16/2021)

GODSON GWASAN.....APPLICANT

VERSUS

NORBETH MALIHELA.....RESPONDENT

JUDGMENT

11th & 28th July, 2023

Kahyoza, J.:

Norbeth Malihela sued **Godson Gwasan** before the District Land and Housing Tribunal (the tribunal) for trespass. **Norbeth Malihela** won the day. The tribunal adjudged **Godson Gwasan** a trespasser. Aggrieved, he appealed to this court contending that the tribunal erred to entertain an incompetent application for failure to join the seller of the suit land and for its failure to consider and evaluate his (**Godson Gwasan**'s) evidence.

The appeal raised two issues as follows-

1. Was the application incompetent for not making the seller a party?
2. Did the tribunal fail to consider the appellant's evidence?

A brief back ground is that; **Norbeth Malihela** purchased the suit land from Gitero Shamgay in 1995 and occupied effectively from that time

to 2020 when **Godson Gwasan** invaded it. He testified that before he purchased the suit land, the owner had allowed NAFCO to use it. NAFCO used the suit land as a tree nursery. In 1995, NAFCO shifted her tree nursery to another area. He added that the suit area had irrigation infrastructure to support the nursery. **Norbeth Malihela,** who was employed by NAFCO approached the owner proposing to procure the suit land. **Norbeth Malihela** purchased it. He involved the hamlet leaders.

One of persons who witnessed the execution of the sale agreement before the hamlet leaders, Leorpard Peter (**Pw2**), testified. He confirmed that **Norbeth Malihela** purchased the suit land from Gitevo in 1995. He stated that **Norbeth Malihela** paid Tzs. 10,000/= on the date the sale agreement was executed and paid the remaining sum later. Petro Lucas (**Pw3)** deposed that **Norbeth Malihela** employed him to take care his garden on 1.7.1996. He added that they cultivated onion, tomatoes, and other vegetables. During cross- examination, Petro Lucas (**Pw3)** testified that he was present at the time of executing the sale agreement and that he lived the security guard when NAFCO was running a tree nursery. Joseph Bernard Baynet (**Pw4**) confirmed the allegation that NAFCO used the suit land 1992 to 1995. Joseph Bernard Baynet (**Pw4**) was employed by NAFCO and his task was to take care the tree nursery. He was working under

Norbeth Malihela. He added that in 1995, NAFCO shifted to another area and in 1996, Joseph Bernard Baynet (**Pw4**) started working for **Norbeth Malihela**.

Norbeth Malihela tendered a sale agreement as exhibit P.1. He alleged that in 2020 the appellant invaded his land. He complained to police as the appellant invaded his land and disrupted the irrigation infrastructure. Police instituted a criminal case before the primary court. The primary court advised him to institute a land dispute.

Godson Gwasan, the appellant, testified that he acquired the suit land in 1992 and that it was allocated to him by the village leaders. He alleged that he built the house on the suit land in 1993. Regina Mateo (**Dw2**) deposed that the suit land is the property of a church since 1992. The land is bordered by NAFCO tanks and NAFCO tree nursery one side. During cross-examination, Regina Mateo (**Dw2**) deposed that she wondered why **Godson Gwasan** did not take steps after **Norbeth Malihela** invaded the land until a long period passed. There is another witness in the name of Maria Tango (**Dw3**) who gave evidence that the suit land was NAFCO's land. NAFCO used the disputed land as a tree nursery. Maria Tango (**Dw3**) deposed that after NAFCO left the suit land, **Norbeth Malihela,** the respondent invaded the suit land.

The appeal was heard orally. Mr. Festo Jackson, learned advocate, appeared for **Godson Gwasan,** the appellant and **Norbeth Malihela,** the respondent, fended for himself.

Was the seller a necessary party in the circumstance of this case?

The appellant complained that the tribunal erred to determine the suit in the absence of the necessary party. The appellant's advocate alleged that the respondent bought the suit land in 1995 from Gitero Shamkai but he did not join him as party. He added that the respondent did not call the seller as a witness or join him as a party. He submitted that the rationale for joining a seller in the suit was explained in the case of **Francis Nkwabi v. Lawrence Chimwaga,** Civil Appeal No. 531/2020 (CAT unreported).

Norbeth Malihela, the respondent, replied that there was no need to call the seller to testify or join him as party to the suit as there was evidence that he bought the suit land and the seller was dead. He added that he did not see the need of summoning the seller as, he, **Norbeth Malihela,** the respondent, had been in occupation of the suit land for 25 years without interference.

I, without hesitation, stated that **Norbeth Malihela,** the respondent, was not bound to make Gitero Shamkai, a person who sold to him the suit

land a party to the suit. The reasons are not farfetched; **one, Norbeth Malihela** sued the appellant for trespass. He had no cause of action against a person who sold the suit land to him. There is ample evidence from the respondent and his witnesses that the respondent bought the disputed land in 1995 and occupied it effectively without any interference for a period of 25 years. Maria Tango (**Dw3**), one of the appellant's witnesses, gave evidence in support of the respondent's evidence. She deposed that after NAFCO left, the respondent took possession of the suit land. Since there is evidence that NAFCO, left the suit land in 1995, then Maria Tango (**Dw3**) supported the contention that the respondent occupied the suit land from 1995. Having occupied the suit land for 25 years uninterrupted, **Norbeth Malihela** had no cause of action against Gitero Shamkai. The appellant's advocate did not suggest how the respondent ought to have joined the seller to the application. He did not specify whether **Norbeth Malihela** had to join the seller as a plaintiff or a defendant. The respondent deposed that the appellant destroyed his irrigation infrastructure. The seller did not take part in the destruction. All in all, a party suing has the right to choose who to sue. Such is the position of the law as prescribed in Order 1 rule 10 (2) of the Civil Procedure Code, [Cap. 33 R.E. 2019] which states that-

"(2) The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or ***whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."***

The Court of Appeal in **Farida Mbaraka and Another v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) emphasis the position that the plaintiff, in this case the applicant has a right to choose whom to sue. It stated-

"Needless to say, the respondent is the ***dominus litis*** *and she is the master of the suit. She cannot be compelled to litigate against someone she does not wish to implead and against whom she does not wish to claim any relief..."*

The court has mandate to interfere when and only when a necessary party was not joined. A necessary is party whose absence **the court cannot effectually and completely to adjudicate upon and settle all the questions involved in the suit.** The respondent had no cause of action against a person who sold him the suit land. The cause of action arose as result of appellant destroying the respondent's irrigation infrastructure

installed to the suit land. I find no merit in the first ground of appeal. The seller in the circumstances of this case was not the necessary party.

Were the proceedings rendered nullity by change of assessors?

The appellant's advocate submitted that there was exhibit tendered but the record does not show that it was admitted. He referred to page six of the typed proceedings.

I examined the both the typed and handwritten proceedings. Both proceedings showed that the respondent prayed to tender the sale agreement. The tribunal asked the appellant whether he had any objection. The appellant stated that he had no objection. The tribunal stated that the sale agreement was exhibit P1 (Hati ya mauzo kielelezo P1). I see nothing wrong with that record. The tribunal omitted to say it admitted and marked exhibit P1 but the fact that the exhibit was marked as exhibit P.1, it goes without saying that it was admitted. It is my conviction that there is no omission if it is there it is not fatal. It is cured under section 45 of the Land Disputes Court Act, [Cap.216 R.E. 2019].

The appellant's advocate submitted that the tribunal was not properly constituted as the assessors and the chairman kept changing. The record showed that the trial was conducted by Hon Mdachi and Mwihava. As to

assessors, he submitted that they kept changing, on 18.3.2021, assessors were Barie and Hyera, on 24.6.2022 assessors were Barie and Sulle whereas on 14.7.2022 assessors were Barie and Hamida.

He submitted further that on the date Maria Tango testified, the coram indicated that chairman was Mdachi but at the conclusion of the proceedings it was Mwihava who signed the proceedings.

It is trite law that change of assessors during hearing vitiates both the proceedings and judgment of the trial tribunal. I examined the typed proceedings and the hand-written proceedings and found that the two records differ as to the assessors who participated. The handwritten proceedings show that there were no changes of assessors on vital dates, that the hearing dates, the date of visiting the *locus in quo* and the date of giving opinion. The handwritten proceedings depict that the assessors were Mr. Hyera and Ms. Hamida throughout those dates. Whereas the typed proceedings show change of assessors on those dates. The typed proceedings show that when hearing of the application commenced on 14.7.2022 tribunal was composed of Hon. Mwihava as a chairperson and M. Barie and Ms. Hamida as assessors when the respondent and all his witnesses testified. However, the assessors who asked questions were Mr. Hyera and Ms. Hamida. The same thing happened on 22.7.2022 when

hearing proceeded by appellant giving his evidence. After the appellant testified, the tribunal adjourned the matter to 6.9.2022 when the appellant's witnesses testified. On that day, the tribunal was composed by Hon. Mwihava as a chairperson and M. Barie and Ms. Hamida but the assessors who asked questions were Mr Hyera and Ms. Hamida the record shows that on the date of visiting the locus in quo, the tribunal was composed of Hon.Mwihava as a chairperson and M. Hyera and Ms. Hamida as assessors.

It is settled that in case of conflict between handwritten and typed proceedings, the handwritten proceedings take precedent. Since the handwritten proceedings show no change of assessors on the dates of hearing, date of visiting the locus in quo, and the date of giving assessors, I hold that there was not change of assessors, which would vitiate the proceedings and judgment. I dismiss the complaint.

Are the proceedings a nullity by change of chairmen?

It has been found that the chairman did not change after the trial commenced. Hearing commenced before Hon. Mwihava on 14.7.2022, when the applicant and his witness testified. It proceeded on 22.7.2022 and on 6.9.2022, before the same chairman, Hon. Mwihava, when appellant gave his evidence and when the appellant's witnesses testified, respectively. As the handwritten proceedings bears testimony, it is Hon. Mwihava, the

chairman, who visited the *locus in quo*, received the opinion and composed the judgment. Thus, the chairman did not change as alleged. It is the chairman who heard the evidence who composed the judgment. The complaint is baseless.

Did the tribunal err to consider the evidence gathered at the locus in quo?

The appellant's advocate submitted that the tribunal considered the evidence of people who were not witnesses. It considered the evidence of Paul Amons. Paul gave evidence how the Samson gave his land to NAFCO and how NAFCO returned the land to Samson. He concluded that the respondent's evidence was too weak and that it did not pass the test.

The evidence received at the locus in quo is part and parcel to the proceedings otherwise there would be no meaning of visiting the *locus in quo*. The Court of Appeal of Tanzania in explained circumstances under it vital to visit the *locus in quo* in **Avit Thedeus Massawe v. Isidory Assenga** Civil Appeal No. 6/2017 (unreported), 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. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to*

clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located. The essence of a visit to a iocus in quo has been weli elaborated in 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* ***OthinielSheke V Victor Piankshak*** *(2008) NSCQRVol. 35.*

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.dominie 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 is added).

From the above excerpt, the court or tribunal may apply the evidence obtained at *locus in quo* to clear doubts or fill in gaps in the evidence produced before it. I find no reason for the appellant's complaint. Even, if I expunge the evidence gathered at the *locus in quo,* (Paul Amos' evidence)

still there is ample evidence in favour of the respondent. The respondent gave uncontradicted evidence how he obtained the suit land and summoned three witnesses who were credible ones. While the appellant's witness gave evidence, which weakened the appellant's case and supported the respondent's case. Even if, the tribunal was to rely on the appellant's evidence it would have found in the respondent's favour.

The appellant's evidence given by Maria Tango (**Dw3**), that, the respondent invaded the suit land in 1995 after NAFCO left. Let us take that evidence as true, that the respondent invaded the suit land in 1995 after NAFCO left, that means the suit land is not the respondent's land. It was either NAFCO's land or if NAFCO was a licensee, it was somebody's land. That somebody may include the appellant. Regina Mateo (**Dw2**) joined Maria Tango (**Dw3**)'s evidence. She deposed during cross-examination that she wondered why **Godson Gwasan** did not take steps against **Norbeth Malihela,** after the latter invaded the suit land until a long period passed.

The law is settled, it protects a person who has occupied land for a long period. Thus, given the appellant's evidence, it is beyond dispute that the respondent occupied the disputed land peacefully from 1995 to 2020 when the dispute arose. Thus, the respondent occupied the suit land

adversary for long period, he is not to be disrupted. He has acquired it by adverse possession.

The doctrine of adverse possession as the Court of Appeal observed in **Bhoke Kitang'ita V. Makuru Mahemba**, Civ. Appeal No. 222/2017 CAT (Unreported) stated that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession.

In the end, I find no merit in the two grounds of appeal. Consequently, I dismiss the appeal and uphold the judgment and decree of the District Land and Housing Tribunal. The respondent is awarded costs.

It is ordered accordingly.

Dated at Babati, this **28th** day of **July,** 2023.

John R. Kahyoza,

Court: Judgment delivered in the presence of the appellant, Mr. Festo, the appellant's advocate and the respondent. Ms Fatina (RMA) is present.

John R. Kahyoza,
Judge
28. 07.2023