UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

IRINGA REGISTRY

AT IRINGA

LAND APPEAL CASE NO. 8 OF 2023

(Originating from Application No. 31 of 2019 in the District Land and Housing Tribunal of Njombe at Njombe)

GERMANUS MAYEMBA.....APPELLANT

VERSUS

OTHUMARY SILINU.....RESPONDENT

JUDGMENT

Date of Last Order: 26.07.2023
Date of Judgment: 11.08.2023

A.E. Mwipopo, J.

Germanus Mayemba, the appellant, was sued in the District Land and Housing Tribunal for Njombe District at Njombe (herein referred to as DLHT) in Application No. 31 of 2019 by Othumary Silinu, the respondent, for trespassing into the disputed land located at Uliwa Village in Njombe District. The case was heard in full, and the trial Tribunal decided the case in the respondent's favour. The Tribunal declared the respondent to be the lawful

owner of the land in dispute, it ordered the appellant to pay general damage of shillings 5,000,000/= to the respondent, to vacate from the land in dispute, and to pay the cost of the suit. The appellant was dissatisfied with the decision, and he preferred this appeal. The memorandum of appeal filed by the appellant contains five grounds of appeal as shown hereunder:-

i. *That, the trial tribunal erred in law and facts for failure to make an analysis and evaluate the evidence hence the unfair decision.*
ii. *That, the trial tribunal erred in law and facts to hold that the appellant was an invitee while there is cogent evidence apart from relying on hearsay evidence from the respondent.*
iii. *That, the trial tribunal erred in law and facts to declare the respondent as lawful owner while the application was time barred.*
iv. *That, the trial tribunal erred in law and facts for failure to observe the established cardinal principles of visiting locus in quo hence miscarriage of justice to the appellant.*
v. *That, the trial tribunal erred in law and facts to declare the respondent a lawful owner while the respondent failed to call material witnesses and thus, an adverse inference was supposed to be inferred.*

At the hearing, Mr Marko Kisakali, advocate, appeared for the appellant, whereas advocate Batista Mhelela appeared for the respondent. The hearing proceeded by way of written submissions, following the prayer by the counsel

for the appellant, which was not opposed by the counsel for the respondent and was granted by this Court.

In his submission, the counsel for the appellant submitted on the 1st ground of appeal that the trial Tribunal failed to adequately evaluate the evidence the appellant adduced, which was very strong compared to the evidence adduced by the respondent. The appellant contended that he acquired the land in dispute in 1978 through allocation by the village authority. Soon after allocation, he made exhaustive improvements by cultivating maize and planting eucalyptus and pine trees, which he harvested in 1990. DW2 corroborated the appellant's evidence. DW2 testified that he was Hamlet chairman and was involved with land allocation to villagers, including the appellant. DW2 said the land was allocated to the appellant in 1978, and he never saw the respondent using the land in dispute. DW2 admitted that Thobias Mahali (PW2) was the village chairman at that time but was not among the members of allocating activity. From 1978 to 2012, the appellant was never questioned about using the land.

The counsel submitted that the respondent's evidence did not show when he used the land in dispute and for what purpose. The respondent had a duty to prove how he acquired the disputed land by calling the one who

was present when his mother gave him the land, but he failed to prove his claim. The position was stated in the case of **Generoza Ndimbo vs. Blasidus Yohanes Kapesi [1988] TLR 73.** It is a well-established principle that the party whose evidence is heavier than that of the other is the one who must win the case, as stated in **Hemed Said vs. Mohamed Mbilu [1984] TLR 113.** The appellant's claim was well-built compared to the respondent's case. The respondent failed to call material witnesses, such as family members and neighbours who witnessed when he was given the land.

In the second ground of appeal, it was the appellant's submission that the trial Tribunal erred in relying in its decision on the evidence of PW2, who was absent when the land in dispute was allocated. The evidence of PW2 is hearsay and is inadmissible. PW2 was not present during the allocation of land in dispute. His evidence is not cogent and reliable.

The appellant's submission on the third ground of appeal is that the respondent instituted the matter after the appellant had utilized it for more than 30 years. The appellant started to use the land in 1978, and the dispute was instituted in 2012. The time limit for claims or recovery of land is 12 years as per sections three and Part 1 Paragraph 22 of the First Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019. Throughout his testimony, the

respondent and his witnesses never stated the time he used to cultivate or plant the trees on the disputed land.

In the fourth ground of the appeal, the appellant submitted that the trial Tribunal failed to observe the principles of visiting the locus in quo when it visited the locus in quo. The Tribunal's record does not show the witnesses of the visit, and there is no record of what transpired in the locus in quo. The trial Chairman did not take notes and quorum of the people at the locus in quo. Failure to follow the principles of visiting the locus in quo vitiates the whole proceedings as the Court of Appeal held it in the case of **Prof. T.L. Maliyamkono vs. Wilhelm Sylvester Erio**, Civil Appeal No. 9 of 2021 (unreported). So long as the trial Tribunal did not follow the procedure, the entire proceedings are supposed to be nullified.

The counsel for the appellant said in the last ground of appeal that the trial Tribunal was supposed to take adverse inference for the respondent's failure to call material witnesses. The respondent brought PW2 and PW3 as witnesses while they were not present during the land allocation. The respondent was supposed to call neighbours bordering the suit land and relatives to prove that his mother gave him the land. There is no explanation for the respondent's failure to call these material witnesses. The respondent's

evidence is more assertion than proof. The appellant cited the case of **Aziz Abdallah vs. Republic {1991} TLR 71** and **Hemed Said vs. Mohamed Mbilu [1984] TLR 113**. The appellant prayed for the appeal to be allowed.

In reply, the counsel for the respondent submitted on the first ground of appeal that the respondent called PW2 and PW3 (Uliwa Village leaders at the time land was allocated) to prove his case. The two witnesses proved that they were responsible during the exercise of land allocation. For that reason, their evidence proved that the land in dispute was allocated to the respondent.

In the 2nd ground of appeal, the respondent said in the submission that the testimony of PW3, who is the ten cell leader and relatives of both appellant and respondent, shows that it was the respondent's mother who was the owner of the land in dispute gave the land to the mother of the appellant for temporary use. The respondent's mother was using the land with his mother. The testimony of PW2 supports the evidence of PW1 on how he acquired the land. The evidence of PW1 is not hearsay.

The counsel for the respondent submitted on the 3rd ground of the appeal that the respondent's evidence proved that the respondent's mother gave the land to the appellant's mother for temporary use to plant millet in

1982. The appellant's mother planted millet and tree seeds on the land. As a result, trees grew in the disputed land. The respondent's mother asked the appellant's mother the reason for planting trees in the area against their agreement in the presence of PW3, and the appellant's mother agreed that the trees should remain with the landowner. When the appellant harvested the trees in 2012, the respondent sued him in the Tribunal for trespassing. The appellant appealed to the High Court, which ordered the matter to start afresh. In 2018 the respondent instituted a fresh suit in the Tribunal. The appellant never used the land since 1978. It was in 2018 when he trespassed on the land. The case was never time-barred, as the appellant alleges it.

The respondent said in the fourth ground of appeal that the trial Tribunal visited the locus in quo to satisfy itself if the appellant complied with its order not to harvest the trees given on 29.12.2021, as seen on page 24 of the proceedings. On 23.02.2022, the counsel for the respondent prayed to the Tribunal to visit the locus in quo, but the Tribunal rejected it for the reason that the dispute between the parties is not on the boundaries but rather on the ownership of the land. On 27.04.2022, the Court assessor proposed to the trial Chairman to visit the locus in quo, and the chairman agreed to the proposal without setting aside his previous order of rejecting

to visit the locus in quo. The Tribunal visited the locus in quo on 13.05.2022, and the visitation was improper. The visitation was the same as nothing, and the prayer for trial de novo should not be given.

Regarding the last ground of the appeal, the respondent responded that the relatives or neighbours were not material witnesses in this case. Material witnesses, in this case, is PW3 as he who know how PW1 was given the land in dispute. PW3 is a relative of both the appellant and the respondent. Also, he was the neighbour of the respondent's parents and PW1. The respondent prayed for the appeal to be dismissed with cost.

In his rejoinder, the appellant insisted that there is no evidence proving that the respondent used the land in dispute, and he never showed the development he made in the land in dispute. On the improper visitation to the locus in quo, the appellant insisted that the trial Tribunal erred in not adhering to mandatory visiting the locus in quo procedures. The Tribunal relied on the weakness of the appellant's case rather than the strength of the respondent's evidence, who failed to call material witnesses.

Having read the respective submissions, the main issue for determining whether this appeal has merits.

The appellant's grounds of appeal are basically in three areas. The first area is on the jurisdiction of the trial Tribunal to determine the matter before it, which was time barred; the second area is there is a procedural irregularity in the proceedings before the trial Tribunal; and the last area is the respondent failure to prove the ownership of the land in dispute.

I will commence determining the issue of jurisdiction of the trial Tribunal to determine the matter claimed to be time-barred as the same touches the jurisdiction of the trial Tribunal to determine the matter. The issue is the 3rd ground of the appeal in the appeal petition. The appellant said he had utilized it for more than 30 years, from 1978 to 2012, when the respondent filed the first suit in the DLHT. The appellant started to use the land in 1978, and the dispute was instituted in 2012. The time of instituting the suit was out of 12 years limit for claims or recovery of land provided under section 3 and Part 1 Paragraph 22 of the First Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019. Throughout his testimony, the respondent and his witnesses never stated the time he used to cultivate or plant the trees on the disputed land.

In his reply, the respondent said his evidence proved that his mother gave the land to the appellant's mother for temporary use to plant millet in

1982. The appellant's mother planted millet and tree seeds on the land, and as a result, trees grew on the disputed land. The respondent's mother asked the appellant's mother to plant trees in the area against their agreement in the presence of PW3, and the appellant's mother agreed that the trees should remain with the landowner. When the appellant harvested the trees in 2012, the respondent sued him in the Tribunal for trespassing. For that reason, the suit was never time-barred.

In determining this issue, the Law of Limitation Act, Cap. 89 R.E. 2019 provides in section 3 and Part 1 Paragraph 22 of the First Schedule thereto that the time limitation of instituting the suit for claims or recovery of the land is 12 years. After the expiry of 12 years of continuous occupation of the private land without interruption, the occupier has the right to acquire the title of the respective land. The Court of Appeal stated the same principle in the case of **Bhoke Kitang'ita vs. Makuru Mahemba**, Civil Appeal No. 222 of 2017, Court of Appeal of Tanzania at Mwanza (unreported), where it held that: -

> *"It is a settled principle of law 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."*

From the above cited case, among things to be proved in the case of adverse possession is occupation of someone's land without permission, and the property owner does not exercise his right to recover it within 12 years. However, possession and occupation of land for a considerable period do not automatically give rise to a claim of adverse possession. It was not adverse if the occupier's right to occupation was derived from the owner in the form of permission or agreement. In **Registered Trustees of Holly Spirit Sisters Tanzania vs. January Kamili Shayo & 136 Others**, Civil Appeal No. 193 of 2016, Court of Appeal of Tanzania at Arusha (unreported), 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 the lawful title, such as the present situation, which was based on an 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 premises."*

In the present case, the evidence shows that the respondent's mother gave the land to the appellant's mother in 1982 to plant millet and not

permanent crops, as the land belongs to the respondent. This evidence means the occupier of the land entered into the suit land with the permission of the respondent's mother. There was consent from the land owner for the appellant to be in the suit land to cultivate millet. The evidence further shows that after the appellant and his mother planted millets and trees in the suit land, the respondent's mother reported to the village leaders about her act of growing permanent clops in the suit land. The appellant's mother agreed that the trees remain the landowner's property. The cause of action arose after the appellant harvested the trees contrary to the previous agreement. In 2012, the respondent sued the appellant after the appellant harvested the trees. There is no adverse possession in this case. Thus, the suit was not time-barred, and the ground has no merits.

Regarding the procedural irregularity in the proceedings before the trial Tribunal, the appellant said in the 4th ground of appeal that the DLHT failed to observe cardinal principles of visiting the locus in quo. The Tribunal's record does not show the witnesses of the visit, and there is no record of what transpired in the locus in quo. The trial Chairman did not take notes and quorum of the people at the locus in quo. Failure to follow the principles of visiting the locus in quo vitiates the whole proceedings. In his response, the

respondent admitted that the trial Chairman visited the locus in quo on 13.05.2022. The visit to the locus in quo was improper as there is a ruling of the Tribunal dated 23.02.2022 rejecting the prayer by the counsel for the appellant to visit the locus in quo. The reason for rejection is that the dispute between the parties is not on the boundaries but rather on land ownership. The visit to the locus in quo on 13.05.2022 was after one assessor proposed to the trial Chairman to visit the locus. The chairman agreed to the proposal without considering his refusal to visit the locus in quo. The respondent was of the view that the visitation was the same as nothing and prayed that trial de novo should not be given.

As stated by both counsels, the Tribunal visited the locus in quo on 13.05.2022 following the prayer by the remaining assessor in the trial. The record shows on page 29 that the Tribunal, in its order, agreed with the assessor that the Tribunal should visit the locus in quo in order to give a just decision. When the Tribunal visited the locus in quo on 13.05.2022, the coram shows that the Chairperson, assessor, Tribunal Clerk and respondent were present. It also shows that the appellant was absent. The record reveals that the respondent and his witnesses did show the land in dispute. The names of the witnesses were not provided, and the record is silent as to what exactly

was shown by the witnesses and what was observed by the Chairperson. After that, the Tribunal received the assessor's opinion and delivered its judgment.

I agree with both counsels that the visitation to the locus in quo was improper. The trial Chairperson vacated his former order rejecting to visit the locus in quo issued on 23.02.2022. By itself, this is an irregularity. Further, the record on visitation to the locus in quo shows the presence of Chairperson, assessor, Tribunal Clerk, and respondent. What transpired at the suit land was not recorded in detail. The record indicates that the respondent and his witnesses did show the suit land. The names of witnesses were not registered, and what was observed by the trial Chairperson in the locus in quo was not shown.

It is trite law that visiting the locus in quo is not mandatory. But when the Court finds it necessary to visit the locus in quo, parties, their advocates, if any, and witnesses who have testified must attend. Also, the notes should be taken during the visit, and when the Court reassembles, the notes should be read out to parties to ensure their correctness. The position was stated in **Sikuzan Saidi Magambo & Another vs. Mohamed Roble**, Civil Appeal

No. 197 of 2018, Court of Appeal of Tanzania at Dodoma (unreported); and in **Nizar M.H. vs. Gulamali Fazal JanMohamed [1980] TLR 29**.

For the visit of the locus in quo to be meaningful, the trial Chairperson was supposed to ensure that all parties, their witnesses, and advocates (if any) were present. The Chairperson has to allow the parties and their witnesses to adduce evidence on oath at the locus in quo, allow cross-examination by either party, record all the proceedings at the locus in quo, and record any observation, view, opinion or conclusion of the Tribunal including drawing a sketch plan if necessary which must be made known to the parties and advocates, if any. The position was stated by the Court of Appeal in **Kimonidimitri Mantheakis vs. Ally Azim Dewji & Others**, Civil Appeal No. 4 of 2018, Court of Appeal of Tanzania at Dar Es Salaam (unreported).

In this matter, the proceedings are silent on what transpired, if the witness testified on oath and their identities, if parties were allowed to cross-examine witnesses and what was observed by the Tribunal. In the absence of the recorded proceedings showing witnesses in attendance, witnesses who testified, if the witness were cross examined and any observation by the trial

person, it is not safe to assume that the visit to the locus in quo was adequately conducted.

The counsel for the respondent was of the view that the omission was improper but did not vitiate the proceedings. On his side, the counsel for the appellant thought that the omission vitiated the proceedings. The omission vitiates the proceedings where it occasions a miscarriage of justice. The position is provided in section 45 of the Land Disputes Courts Act, Cap 216 R.E. 2019. The section provides that:

> *"45. No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."*

In the case at hand, the Court is aware that in the absence of a record of what transpired during the visit in locus in quo, it is not possible to make a proper re-evaluation of the entire trial evidence, including what had happened at the visit in the locus in quo. The remedy in such a situation is to nullify the proceedings from when the DLHT visited the locus in quo on 13.05.2022 onwards, as it was held in the case of **Prof. T.L. Malywamkono**

vs. Wilhem Silivester Erio (supra). However, as the visit to the locus in quo, in this case, was done after witnesses from both sides had testified, nullifying the proceedings from the date of visiting the locus in quo onward does not affect the evidence in the record.

Besides, the Court observed that the trial Tribunal said nothing in its judgment on the visitation to the locus in quo. It means the visitation to the locus in quo was not the basis of the decision of the trial DLHT. In such a situation, I do not see how the omission has occasioned a failure of justice in this case. As the parties have been in Court corridors prosecuting this case for more than ten years since 2012, it is in the interest of justice for the matter to be determined on merits. The omission is served by section 45 of Cap. 216 R.E. 2019. Thus, the ground has no merits.

Regarding the proof of the land ownership in dispute, the appellant alleges that the trial Tribunal failed to analyze and evaluate the evidence in the record, which proved that he was the owner of the suit land. The issue covers the grounds of appeal No. 1, 2 and 5. The appellant submitted that he acquired the land in dispute in 1978 through allocation by the village authority, and soon after allocation, he made exhaustive improvements by cultivating maize and planting eucalyptus and pine tree, which he harvested

in 1990. The appellant's evidence is corroborated by DW2, the hamlet chairman, who was involved with land allocation to villagers, including the appellant. From 1978 to 2012, the appellant was never questioned about using the land. The respondent failed to prove how he acquired the disputed land by calling the one present when his mother gave him the land. The trial Tribunal relied upon the evidence of PW2, which is hearsay and inadmissible. PW2 was not present during the allocation of the land in dispute, and his evidence is not cogent and reliable. The respondent failed to call relatives and neighbours who are material witnesses. As a result, the trial Tribunal was supposed to take adverse inferences. There is no explanation as to the reason for the respondent's failure to call these material witnesses. The respondent's evidence is more assertion than proof.

The respondent replied that he called PW2 and PW3 (Uliwa Village leaders when the land was allocated) to prove his case. The two witnesses proved that they were responsible during the exercise of land allocation. The evidence established that the land in dispute was allocated to the respondent. The testimony of PW3, the ten-cell leader and relatives of both the appellant and respondent, shows that the respondent's mother, the landowner in dispute, gave the land to the appellant's mother for temporary use. The

respondent was using the land with his mother. The testimony of PW2 supports the evidence of PW1 on how he acquired the land. The evidence of PW1 is not hearsay. The relatives or neighbours were not material witnesses in this case. The material witness is PW3, who knows how PW1 was given the land in dispute. PW3 is a relative of both the appellant and the respondent. Also, he was the neighbour of the respondent's parents and PW1.

The law provides under sections 110 (1), (2) and 111 of the Evidence Act, Cap. 06 R.E. 2022 that he who alleges must prove, and the standard is one on a balance of probabilities. In the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, Court of Appeal of Tanzania at Mwanza (unreported), it was held on page 14 that:-

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap, 6 [R.E 2002]. It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other..."*

In the case at hand, both parties claimed to be the owner of the suit land. The respondent had a duty to prove before the trial DLHT that the land in dispute belonged to him as he is the one who instituted the suit at the

DLHT. The respondent (PW1) testified that he acquired the land in 1973 from his mother after finishing standard seven. In 1974 and 1975, he cultivated millet and harvested it. In the same year, 1975, he was employed in Dar Es Salaam, and the land remained with his mother. PW2 supported the respondent's testimony that the respondent's parents owned the land and they left it to the respondent.

PW3 testimony shows that he was the tencell leader and responsible for allocating land to people who migrated to Uliwa during operation sogeza Kijiji. The respondent's mother gave them some of the lands he was not using save for the land which belongs to the respondent. PW3 said he was the one who took the appellant's mother to Uliwa from Utengule, and they built her a house at Uliwa. The appellant's mother borrowed the land from the respondent's mother for cultivating crops in 1980. The respondent's mother gave the land on condition not to plant permanent crops. The appellant's mother planted trees, leading to a dispute between her and the respondent's mother. The dispute was resolved by the appellant's mother to handle the trees to the land owner. After the respondent's father died, the respondent's mother gave the land to the respondent.

On his side, the appellant said that he was allocated the land in 1978 by the village authority, and he utilized the land immediately by cultivating crops and trees. His testimony is supported by DW2, who said he was the ten cell leader of the Canada area and was responsible for allocating land to migrants to Uliwa area. DW2 said the land was allocated to the appellant.

Although both parties claim to be owners of the suit land, the respondent's evidence is heavier than that of the appellant. The testimony of PW1, PW2 and PW3 proved that the land in dispute was owned by the respondent's mother, who gave it to the respondent after her husband died. The land was hired by the appellant's mother for farming on condition not to cultivate permanent crops. The respondent said he was given the land by his mother in 1973, and the appellant said the land was allocated to him in 1978. DW2, who said he participated in allocating the land to the appellant, was not the leader of the respective area. The leader of the area was PW3. PW3 testified that he was the tencell leader of the area and neighbour to the suit land. He was responsible to find land for migrants and respondent's mother gave them land save to the land which belongs to the respondent. He testified that he was the one who brought the appellant's mother to Uliwa from Utengule and borrowed the land for her to cultivate from the respondent's

mother. This evidence is heavy and proves that the respondent was the owner of the suit land. It gave a picture of how the appellant came into possession of the suit land. PW3 is a material witness in this case, and there is nothing to discredit his evidence. There is no need for the respondent to call respondent's relatives or neighbours to the suit land as witnesses since PW3 evidence is sufficient. I'm satisfied that the trial Tribunal correctly analyzed and evaluated the evidence on record and adequately reached the decision.

Therefore, the appeal lacks merits, and I dismiss it with cost. It is so ordered accordingly.

A.E. MWIPOPO

JUDGE

11/08/2023