IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 147 OF 2022

(C/f Land Application No. 45 of 2020 in the District Land and Housing Tribunal for Mbulu at Dongobesh)

DAUDI PETRO ....APPELLANT

VERSUS

SAMWEL ATHANASIO MATHIYA ..... RESPONDENT

JUDGMENT

01st June & 28th August 2023

KAMUZORA, J.

This appeal emanates from the judgment and decree issued by the District Land and Housing Tribunal for Mbulu at Dongobesh in Application No. 45 of 2020 (hereinafter to be referred to as the trial tribunal). The decision of the Tribunal was made in favour of the Respondent herein who was declared the lawful owner of land, plot No. 25 Block D, Haydom, within Mbulu District in Manyara Region which was resurveyed and changed to Plot No. 47 Block A herein to be referred to as the suit land.

The brief facts leading to this appeal as may be glanced from the record is such that, the Respondent sued the Appellant before the trial tribunal claiming that he is the lawful owner of the suit land on the claim that he was allocated the same in year 1998. The Respondent claimed that he paid all the relevant fees, built a dwelling house and leaved therein. That, in year 2017 the Respondent decided to erect another permanent structure in the suit land. That, the Appellant invaded the suit land and started construction without building permit. It was from that intrusion that the Respondent decided to institute a suit before the trial tribunal against the Appellant herein.

It was the Appellants defence before the trial tribunal that, he is the legal owner of the suit land after he inherited it from his father in year 1950 and that the same has family graves in it. That, in 1998 his land was allocated to the Respondent by the Land Department of Mbulu with no any compensation and he tried to sue the Land office of Mbulu in vain. The trial tribunal after hearing the evidence from both parties delivered its decision in favour of the Respondent. The Appellant was dissatisfied by the trial tribunal's decision and preferred this appeal seeking to set aside that decision. Ten grounds of appeal were listed in the amended petition of appeal. However, during submission, the

counsel for the Appellant opted to abandon three grounds and retained seven grounds which are renumbered and restated as hereunder: -

1) *That, the District Land and Housing Tribunal for Mbulu erred in law and fact when it decided that the piece of land in dispute belong to the Respondent in absence of documentary evidence supporting the claim.*
2) *That, the District Land and Housing Tribunal for Mbulu erred in law when it declined to decide that the Appellant was the lawful owner of the piece of land by virtual of being in possession of the same for more than twelve years.*
3) *That, the trial tribunal erred in law and fact by proceeding with hearing and determination of the Respondent's application without joining the Government as a necessary party to the suit.*
4) *That, the trial tribunal erred in law and fact by not considering the Appellant's evidence hence reached to erroneous decision.*
5) *That, the trial tribunal erred in law and fact by declaring that the graves were not in the disputed land while the trial tribunal refused to visit locus despite of its order.*
6) *That, the trial tribunal erred in law and fact by not visiting the locus while the same trial tribunal fixed the date to visit locus hence, reached to erroneous decision.*
7) *That, the trial tribunal erred in law and fact by failure to evaluate evidence adduced by both parties hence, reached to erroneous decision.*

As a matter of legal representation, Ms. Asha Musa Qambadu, learned advocate appeared for the Appellant while the Respondent was represented by Mr. Castro Pius Shirima, learned advocate. The appeal was argued by way of written submissions and both parties filed their submissions as scheduled.

Submitting in support of the 1st ground, the Appellant's counsel submitted that the Respondent did not present any document before the trial tribunal showing that he was the lawful owner of Plot No 47 A formally known as Plot No 25 D and no evidence was tendered proving that plot No 25 D changed to plot No 47 A.

On the 2nd ground, it is the submission by the Appellant's counsel that the Appellant stayed in the disputed land from 1987 to 2020 when the dispute arose and that the Appellant made some developments over the suit land by building a house. That, the Appellant also paid land rent and was asked to stop paying for the same when the dispute arose and after the district council surveyed the suit land. He insisted that the Respondent was time barred to claim the land as the Appellant stayed in the suit land for more than 12 years hence, covered by the principle of adverse possession as per item 22 of the Schedule to the Law of Limitation Act Cap 89 R.E 2002. He also referred the case of

Nengilang'et Ngalesoni Vs. William Emmanuel, Misc. Land Appeal No. 4 of 2022.

On the 3rd ground, the Appellant's counsel submitted that the government was supposed to be joined in the suit before the trial tribunal as they are the one who allocated the suit land to both the Appellant and the Respondent. Reference was made to the case of **Mexons Investment Limited Vs. CRDB Bank PLC**, Civil Appeal No 222 of 2018.

On the 4th ground, the counsel for the Appellant submitted that the trial tribunal did not consider the Appellant's evidence in which the Appellant claimed to have obtained the suit land from his late parents in 1987 and the same was surveyed in 1997. That, such evidence was also supported by SU2 and SU3.

On the 5th and 6th grounds, the counsel for the Appellant faults the trial tribunal for its failure to visit the locus in quo to determine as to whether the graves were in land which is part of the suit land or not. That, the trial tribunal erred for not visiting the suit land to ascertain the size and location of the land in question and whether the suit land was registered as plot No 25 D or 47 A. Referring the case of **Mhela Bakari Vs. Manoni Bakari and another,** Land Appeal No. 23 of

2021(Unreported) and **Nizai M. H Vs. Gulamu Fazal Jarimohamed** (1980) TLR 29 the counsel for the Appellant insisted that visiting locus in quo was necessary to determine the size and location of the suit land and who is the real owner of the same.

On the 7th ground, the counsel for the Appellant argued that there was failure by the trial tribunal to evaluate evidence of both parties hence reached to unjust and unreasonable decision. The Appellant prays for the decision of the trial tribunal to be set aside and the appeal be upheld by ordering a trial denovo.

Responding to the appeal, the counsel for the Respondent faulted the Amended petition filed by the Appellant for contravening section 41(1) of the Land Disputes Courts Act, CAP 216 R.E 2019 and Rule 24 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No. 174 of 2003. He contended that the law required a memorandum of appeal to be filed before this court but the Appellant filed an Amended petition of appeal.

Arguing against the appeal, the counsel for the Respondent submitted on the 1st ground that the trial tribunals judgment is clear on how the Respondent acquired the suit land and how it was reassigned a new plot number after it was resurveyed. It is the Respondent's

submission that the changing of plot numbers after realignment of deed plan is a normal practice in land allocation and the same cannot be used by the Appellant as reason for his claim of ownership. He referred this court to the case of **Sixbert Bayi Sanka Vs. Rose Nehemia Samzugi**, Civil Appeal No 68 of 2022 CAT at Tanga (unreported). He implored this court to regard exhibit M1 and evidence by SM1 and SM2 as proving his ownership to the suit land.

On the 2nd ground, the Respondent submitted that the evidence was received proving the issues as opposed to the Appellant's claim that the case was not proved. He was of the view that, authority cited in support of adverse possession is distinguishable because the resurvey of the suit land was made in 2014 and not 1998 when the plot was first surveyed as Plot 25 D.

On the 3rd ground, the Respondent submitted that, the government has to be joined but not in every suit. He contended that the Appellant was unable to state how he was affected by the failure to join Mbulu District council.

On the 4th ground, the Respondent submitted that the Appellant had not shown how he became owner of the suit land. That, since the Appellant claimed to have inherited the suit land which initially belonged

to his deceased father, the same cannot be transferred to the Appellant in the absence of probate matter or letters of administration.

Responding to the 5th and 6th grounds regarding the presence of graveyard on the suit land and visiting the locus in quo the Respondent submitted that visitation of the locus in quo could not justify the presence of graveyard on the registered land. That, visitation of the suit land is exceptional in certain circumstances that the same may be done where the location, size and boundaries are in issue. That, in the matter at hand there was no such exceptional circumstances that would require the visitation of the locus in quo.

On the 7th ground, the Respondent counsel reiterated his submission on the 1st ground and added that there was proper analysis of evidence. He prayed for the appeal to be dismissed with costs.

In a brief rejoinder the counsel for the Appellant reiterated her submission in chief and added that the claim on the incompetence of the amended petition of appeal is baseless as they are just mere words. He urged this court to apply the overriding objective principle and find that the appeal is competent. Reference was made to the case of **Mary Mwambene Vs. Benson Mwashambwa**, Land Appeal No. 42 of 2016. The Appellant further added that documentary evidence is the

best evidence in proving ownership. That, the Respondent was unable to produce any document to prove ownership while the Appellant presented receipt in proof of preparation for securing title deed. He referred the case **Sixbert Bayi Sanka Vs. Rose Nehemia Samzugi,** Civil Appeal No. 68 of 2022 CAT where it was held that documentary evidence which its credence is impeccable would be sufficient to determine a dispute.

On the argument based on adverse possession the counsel for the Appellant added that re- survey of the disputed land was conducted in 1998 and not 2014 hence, the case law cited is relevant. The Appellant's counsel further rejoined that, since there was double allocation of the suit land to the parties, joining the Government was necessary in this case.

Before I go to the merit of appeal, I prefer to respond to the concern raised by the Respondent that the petition before this court is incompetent for it was filed in form of a Petition of Appeal instead of a Memorandum of Appeal as prescribed by the law. Reading the record, it is true that the document is titled Petition of Appeal. It is unfortunate that the Respondent did not raise this issue as a preliminary point of objection rather incorporated the same in his submission against the

appeal. Assuming that the same was properly raised as an objection, this court still finds that, citing the document as Petition of Appeal instead of Memorandum of Appeal did not in any way occasion to miscarriage of justice. Whether it is petition or memorandum it intends to list the grounds of appeal to which the appealing party intends the appellate court to consider in overturning the lower court's decision. This error in my view, is curable by the overriding objective and this court finds prudent to go for substantive justice by determining the rights of the parties.

Reverting to the merit of the appeal I will first address the 1st ground of appeal in which the Appellant faults the decision of the trial tribunal for not considering that there was no documentary evidence proving that the suit land belongs to the Respondent. The evidence before the trial tribunal reveals that the Respondent was allocated the suit land by the Mbulu District Council way back in 1998. This is also evidenced by the allocation letter and receipt for payment of land rent which are collective exhibit M1. Thus, the contention by the Appellant that there was no documentary proof on how the Respondent acquired the suit land is baseless.

On the 2nd ground the Appellants faults the decision of the trial tribunal on account that the tribunal failed to invoke the principle of adverse possession in his favour. It is clear that Item 22 to the First Schedule of the Law of Limitation Act prescribes 12 years as the period of limitation for instituting proceeding for suit to recover land. This principle applies only where it is proved that a party was in full occupation and use of suit land for 12 years consecutively without any interference. This principle has been discussed in number of cases and for this matter I would like to be guided by the decisions in the cases of **Moses Vs. Lovegrove** [1952] 2 QB 533 and **Hughes vs. Griffin** [1969] 1 All ER 460 which were quoted with approval by the Court of Appeal of Tanzania in the case of **Bhoke Kitang'ita Vs. Makuru Mahemba,** Civil Appeal No. 222 of 2017 CAT at Mwanza (Unreported). In the subsequent case the Court of Appeal also referred its decision in the case of **Registered Trustees of Holy Spirit Sisters Tanzania Vs. January Kamili Shayo and 136 Others,** Civil Appeal No. 193 of 2016 and held that: -

> *"[On] the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following: -*
> *(a) That there had been absence of possession by the true owner through abandonment;*

(b) that the adverse possessor had been in actual possession of the piece of land;

(c) that the adverse possessor had no colour of right to be there other than his entry and occupation;

(d) that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;

(e) that there was a sufficient animus to dispossess and an animo possidendi;

(I) that the statutory period, in this case twelve 12 years, had elapsed;

(g) that there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

(h) that the nature of the property was such that in the right of the foregoing/adverse possession would result."

In this matter, the Appellant claims that he has been using the suit land from 1987 to 2020. On one hand, the Appellant at page 21 of the typed proceedings of the trial tribunals, claimed to have inherited the suit land from his parents in years 1987 and that he has been living in the suit land until year 2020 when the dispute arose over the suit land. He also claimed to have made some development over the suit land.

On the other hand, the Respondent at page 9 of the typed proceedings of the trial tribunal claimed that he was allocated the suit

land in year 1998 and was issued with offer letter after payment of requisite fees as per exhibit M1. Exhibit M2 shows that the Appellant in different occasion unsuccessfully sued the Mbulu District Council in challenging the allocation of what he considered his land to other people. since the Appellant claim that he was in occupation and use of land from 1987 and since the allocation he was challenging was done in 1998, the Appellant cannot claim that he was peacefully possession or enjoyment of the suit land for 12 years. Thus, the principle for adverse possession could not stand in the circumstance of this case.

On the 3rd ground it was contended by the Appellant that the government was supposed to be joined in the suit before the trial tribunal for they allocated the suit land to both the Appellant and the Respondent. The Appellant is trying to raise issue of double allocation. However, the Respondent evidence as supported by exhibit M1 shows allocation by the government while the Appellant's evidence as supported by exhibit U1 does not allocation by government. In other words, exhibit U1 it does not indicate that there was any issue of allocation of the suit land to the Appellant rather it is a receipt evidencing payment issued in year 2020 after the dispute arose. In his evidence, there is nowhere the Appellant claimed to have been allocated

land by the government authority. In his testimony at page 21 of the typed proceedings, the Appellant claimed to have inherited the suit land from his parents. He claimed that the suit land was surveyed in 1997 and he was residing therein. He produced a land receipt issued in 2020 which however did not indicate its relevance to the suit land. The plot number is handwritten and there is no explanation as to who was responsible in writing the number and why the same was not part of the details of the receipt. The circumstance of this case does not entail double allocation and if that was the case, the same could have been decided in other cases which the Appellant sued the District Council as per exhibit M2 challenging the allocation. In short, there were no facts which would make it necessary for the government authorities to be joined as a party to the suit. I therefore find no merit in the 3rd ground of appeal.

On the 4th ground that the trial tribunal did not consider the Appellant's evidence, I have gone through the judgment of the trial tribunal and indeed I am satisfied that the Appellant's evidence was considered. At page 7 of the judgment, the chairman assessed the Appellant's evidence in which the Appellant claimed to have inherited the suit land from parents and that there exist grave yards in the suit land.

The trial tribunal reasoned that there was no any evidence adduced by the Appellant to support his claim as opposed to the Respondent's evidence to which the trial tribunal regarded that on balance of probabilities it proved ownership. In fact, the trial tribunal considered evidence from both parties. The tribunal chairman assessed the weight of Respondent's evidence at page 6, and at page 7, the Appellant's evidence was assessed and the conclusion was made that the Respondent's evidence was heavier than that of the Appellant. Thus, the claim that his evidence was not considered in unfounded.

On the 5th and 6th grounds, the Appellant faults the trial tribunal decision for its failure to visit the locus in quo. The Appellant contended that it was necessary for the tribunal chairman to visit the locus in quo for purpose of assessing whether the graves were not in the disputed land and to ascertain the size and location of the suit land and whether the suit land was registered as plot No 25 D or 47 A. He was of the view that, since the trial tribunal fixed the date to visit locus, it reached to erroneous decision by not visiting the locus in quo.

I agree with the counsel for the Respondent that visitation of the suit land is not automatic but it is preferred in exceptional circumstances where there is need to ascertain the state, location, size and boundaries.

That was also the holding of this court in the case of **Mhela Bakari Vs. Manoni Bakari and another** (supra) cited by the Appellant. In the case of **Kimonidimiri Mantheakis Vs. Ally Azim Dewij & 7 others,** Civil Appeal No. 4 of 2018 CAT at Dar es Salaam (Unreported) it was held that,

> *"Whereas the visit of the locus in quo is not mandatory, it is trite law that, it is done only in exceptional circumstances as by doing so a court may unconsciously take a role of witness rather than adjudicator. In this regard, where the court deems it warranted, then it is bound to carry it out properly so as to establish whether the evidence in respect of the property is in tandem with what pertains physically on the ground because the visit is not for the purposes of filling gaps in evidence. Therefore, where it is necessary or appropriate to visit a locus in quo, the court should attend with the parties and their advocates, if any, and with such witnesses as may have to testify in that particular matter."*

The record shows that the Respondent herein prayed before the trial tribunal for the tribunal to visit the locus in quo to assess whether there existed graves and a house allegedly built by the Appellant herein. The prayer was granted and the case was adjourned to another date. But on the date fixed for visitation the tribunal chairman informed the parties that they could not visit the locus on that date as he was unable to secure transport. The Respondent's counsel opted to withdrew his

prayer for the tribunal to visit the locus in quo and the Appellant's counsel conceded to the prayer. This means that the Appellant did not find any necessity for the tribunal to visit the locus otherwise, he would have insisted for the visitation. He cannot therefore complain before this court that the trial tribunal erred in not visiting the locus in quo. But assuming that the tribunal had to visit the locus in quo, in my view, the presence of grave in the suit land in itself does not prove ownership unless there is other cogent evidence to support the same. Since there were no exceptional circumstances that would require the visitation of the locus in quo like determination of location size and boundaries, and parties withdrew their prayer for visitation, the chairman was justified in not visiting the locus in quo.

Regarding the issue of plot number being changed, I do not see how the visitation would assist parties in dispute in determining the registration of plot number. It should be noted that, the registration under land system is more that a mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transaction that confer affect or terminate that ownership or interest. For this see the case of **Nacky Esther Nyange Vs. Mihayo Marijani Wilmore and another,** Civil

Appeal No 207 of 2019, CAT at Dar es Salaam (Unreported). In this matter, the evidence of SM2 reveals that initially the suit land was registered as plot No. 25 D during the first survey and changed to plot no 47 A after a re-survey. Since there was a registration of the suit land the visitation of the suit land would cover no any useful use as registration evidences authentication of plot number and ownership of the suit land. I therefore find grounds 5 and 6 meritless.

On the 7th ground that there was no proper evaluation of evidence by the trial tribunal, I reiterate my discussion in ground 4 above. In addition, I am satisfied that the trial tribunal clearly evaluated and assessed the evidence of both parties as can be seen from page 2 to 8 of the typed judgment. I am in agreement with the trial tribunal conclusion that the Respondent's evidence proved on how he was allocated the suit land. His evidence is well supported by documentary evidence and well as SM2 who verified that the land was first surveyed as Plot 25 D and later resurveyed as plot 47 A. However, on the Appellant's side there is no evidence supporting inheritance process of the suit land and if surveyed in his name the document in support of such survey. The receipt tendered by the Appellant was issued in 2020 and in my view, it did neither prove allocation nor survey of the suit in

favour of the Appellant. Since the Appellant claimed to have inherited the suit land in 1987, it was expected for him to submit probate documents in proof of that fact. Again, since the Appellant also claimed that his land was surveyed in 1997, it was expected for him to present document proving survey as it was so done by the Respondent. At least he could have tendered a receipt evidencing survey done in 1997 but he only tendered a receipt issued in 2020 which does not indicate its connection with the survey.

From what I have endeavoured to discuss above, it is my settled mind that the trial Tribunal was correct to conclude that on balance of probabilities, the Respondent proved ownership of the suit land. The appeal is therefore devoid of merit and the same is hereby dismissed. The Appellant shall bear the costs of the appeal.

DATED at **ARUSHA** this 28th day of August, 2023

D.C. KAMUZORA

JUDGE