IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 117 OF 2022

(C/F Application No. 22 of 2018 at the District Land and Housing Tribunal of Karatu at Karatu)

ROGATHE AWE.....1ST APPELLANT

PASKALI AWE.....2ND APPELLANT

VERSUS

CECILIA HERMAN.....RESPONDENT

JUDGMENT

Date of last Order:4/9/2023

Date of Judgment:26/9/2023

MWASEBA, J.

The respondent one Cecilia Herman filed an application at the District Land and Housing Tribunal for Karatu at Karatu (to be referred as the DLHT henceforth). Among others, the said Cecilia Herman sought the following reliefs: that the tribunal to declare her and her husband as the lawful owner of the suit land measuring 2 acres and an order for eviction against the appellants herein together with the costs of the application.

In her application, the respondent claimed that the disputed land once belongs to her father-in-law, and it was given to them in 1973 they had been using it until sometimes in the year 2017 when the appellants started claiming ownership over the suit land. On their side, DW2 (Awe Margwe) claimed that the land belongs to him as he inherited it from his father as the last born and the appellants are his children who were wrongly sued by the respondent. He submitted further that he gave the disputed land to appellants in 2004 and they built their houses in disputed land.

Having heard both parties and their witnesses, the DLHT decided that the disputed land belongs to the respondent herein as she proved her claim on the balance of probabilities. Aggrieved by the DLHT's decision, the appellants knocked the doors of this court armed with five grounds of appeal namely:

1. *That the respondent failed to prove her case on the preponderance probabilities for not adducing the important evidence.*
2. *That the trial Chairman erred in law and fact for poor analysis of the evidence hence one sided and biased.*

3. *That Hon. Chairman misapplied the principle of adverse possession without considering the circumstance of the case.*
4. *That Hon. Chairman wrongly declared the respondent lawful owner without any proof that she was given the suit land.*
5. *That the trial Chairman ere in law and fact in awarding the specific damages without proof.*

During the hearing of this appeal, both the appellants and the respondent appeared in person, unrepresented. Eventually, the hearing of the appeal was ordered to proceed by way of written submission. Parties' written submissions subsequently filed in this court as per the order.

Submitting in support of the appeal, on the 1st and 2nd grounds of appeal, the appellant complained that the case was not proved on the preponderance of probabilities. He submitted that there was a re-examination after the questions of the assessor contrary to **Section 177 of the Evidence Act**, Cap 6 R.E 2019. See the case of **John Qamunga and two others v. Erika Qamunga**, Land Appeal No. 34/ 2022 (Unreported).

It was their further submission that, the respondent did not have any document to prove he was given the land by her father-in-law and there

were contradictions among her witnesses regarding the size and boundaries. It was not clear if the size of the land was 2 ½, 1 ½, or 2 acres. They stated further that AW3 gave a false statement that the respondent was on the suit land since 1973 while he was not yet born. Thus, the respondent's case was not proved on the balance of preponderance as required under **Section 110 (1) and (2) of the Law of Evidence Act**, Cap 6 R.E 2019. He supported his argument with the case of Registered **Trustees of Joy in the Harvest v. Hamza K. Sungura**, Civil Appeal No. 149 of 2017.

Coming to the 2nd and 4th grounds of appeal, the appellants complained that there was misapprehension of the principle of adverse possession by the trial tribunal hence declared the respondent as the lawful owner. They submitted that the principle of adverse possession cannot be applied where the one who filed the suit is a plaintiff as it cannot be used as a weapon to file a suit. He referred this court to the case of **Honourable Attorney General v. Mwahezi Mohamed & 3 Others**, Civil Appeal No. 391/2019 (Unreported).

Regarding the last ground of appeal, the appellants grieved that it was wrong for the trial tribunal to award general damages while the respondent did not plead nor plea, she suffered any damage. Their

argument was supported with the case of **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 137. They prayed for the appeal o be dismissed with costs.

Opposing the appeal, on the 1st and 2nd ground of appeal, the respondent submitted that she disagrees that a case was proved on the balance of preponderance. She argued further that the evidence was well evaluated by the trial tribunal and there is no need for this court to invoke its power of re-evaluating the evidence. Thus, the allegation of the appellants before this court lacks merit.

Coming to the 3rd and 4th ground of appeal, the respondent submitted that the issue of adverse possession is just a mere allegation of the appellants. She argued further that the disputed land was not left vacant as they have been using it for more than 47 years until the dispute arose in 2017. Bolstering her argument, she cited the case of **Pius Seleman v. Simon Kapuepue Nahuera**, Misc. Land Application No. 60 of 2012.

Regarding the 5th ground of appeal, the respondent submitted that the specific damages was awarded based on the normal prayer of the applicant in her application No. 22 of 2018. Therefore, this ground too

lacks merit. She prayed for the appeal to be allowed and the decision of the trial tribunal be upheld.

In brief rejoinder, they reiterated what has already been subsisted in their submission in chief.

After I have briefly outlined the background of the parties' dispute and the parties' written submission herein, I am now obliged to determine the issue of whether the appeal is meritorious or not.

Starting with the 3rd and 4th ground of appeal, the appellants submitted that it was wrong for the trial tribunal to invoke the principle of adverse possession to the respondent who was the applicant.

I have gone through the trial court proceedings and noted that the trial Chairman did not invoke the principle of adverse possession, he only stated that the applicant and her husband used the disputed land for more than 48 years therefore it is not right to disturb them. The said statement does not amount invoking the principle of adverse possession; thus, these grounds have no merit.

Coming to the 5th ground of appeal, the appellants grieved that the trial tribunal awarded specific damages while the same was not pleaded nor proved by the respondent. I am aware that specific damages must be

pleaded and proved as it was held in the case of in the case of **Bolag v. Hutchson** (1950) A. C. 515, at page 525 that:

> "*What we accept special damages are such as the law will not infer from the nature of the act, they do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly*".

However, in our present case, at the trial tribunal Hon. Chairman did not award specific damages to the respondent, he only awarded costs of the case which was also pleaded by the respondent in her application. So, this ground too is dismissed for want of merit.

Lastly on the 1st and 2nd ground of appeal, the appellant complained that a case was not proved on the balance of probabilities as the respondent failed to submit any documentary evidence that she was given the land by her father-in-law. More to that, even her witnesses did contradict each other regarding the size and boundaries of the disputed land.

In determining these grounds, it is a settled law in civil cases that he who alleges must prove. See the case of **Africarriers Limited v. Millenium Logistics Limited**, Civil Appeal No. 185 of 2018 (CAT at Dar es Salaam, Unreported).

In our present case it was the duty of the respondent to prove her claim on the balance of probabilities. To discharge such duty, she submitted at the trial tribunal that the disputed land once belongs to her father-in-law and later he gave it to the respondent's husband in 1974. The same was supported with the evidence of AW2 (Herman Margwe) the elder father-in-law of the respondent. All the other witnesses testified they have seen the respondent at the suit land since 1973 and that the appellants are the sons of the respondent's young brother.

On their side, the appellants alleged that they were given the suit land by their father (DW2) in 2004 who alleged he inherited it from his father as the last born and that the respondent was given part of the land in Endamarariek Village. He argued further that he had no document that proved he was given the land by his late father.

Based on that evidence, this court do agree with the trial tribunal (DLHT) who also support the opinion of the assessors that the evidence submitted by the respondent was heavier compared to that of the appellants. Therefore, this court finds no merit on the 1st and 2nd grounds of appeal.

Having given the above deliberations, I find no merit in this appeal and is hereby dismissed with costs. I hereby upheld the decision of the District Land and Housing Tribunal of Karatu at Karatu.

It is so ordered.

DATED at **ARUSHA** this 26th day of September, 2023.

N.R. MWASEBA

JUDGE