IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL CASE NO. 22 OF 2022

(Originating from the District Land and Housing Tribunal for Rukwa at Sumbawanga in Application No. 40 of 2020)

AUDIFASI SUNGA.....APPELLANT

1. DEUS FWAMBA
2. WILBROAD FWAMBA
3. ANTONI FWAMBA .....**RESPONDENTS**
4. ZENOBI FWAMBA
5. EVARIST FWAMBA

JUDGMENT

27th July & 29th September, 2023

MRISHA, J.

This appeal stems from Application No. 40 of 2020 at the District Land and Housing Tribunal for Rukwa at Sumbawanga (the trial tribunal) in which the appellant Audifasi Sunga, sued Deus Fwamba, Wilbroad Fwamba, Antoni Fwamba, Zenobi Fwamba and Evarist Fwamba (herein to be referred to as the 1st, 2nd ,3rd, 4th and 5th respondents respectively)

for allegedly invading his 100 acres piece of land (the suit land) located at Ntemba Village, Namanyele, Nkasi District, within Rukwa Region.

In his testimony before the said trial tribunal, the appellant claimed that he had been in undisturbed occupation of the suit land since 1990 which is almost more than thirty years (30), when he was with one Godfrid Ntipula.

On their side, the respondents strongly disputed the appellant's claim on the ground that the suit land belongs to the Fwamba Family to which they all belong and that the appellant being their junior brother's son, started using the suit land and sold it to the Sukuma people in the year 2020 contrary to the family agreement that it should not be sold, but left to be used by all members of the Fwamba family.

Having heard the evidence adduced by the parties before it, the trial tribunal found that the appellant failed to prove his case against the respondents on the balance of probabilities as required of him by the law, due to two reasons; first, that the appellant failed to call a material witness one Godfrid Ntipula, and second, that PW2 being the father of the appellant, was a witness with own interest to serve whose evidence was supposed to be corroborated by another independent evidence, but it was not corroborated as such.

The above decision by the trial tribunal did not please the appellant at all. He therefore, preferred the instant appeal by fronting six grounds of appeal as follows: -

1. *That, the learned chairperson of the tribunal erred in law and fact by failing completely to evaluate the evidence of the appellant; if that could be done (sic) could come with different decision.*
2. *That, the trial chairperson did not consider on proper way of obtaining the farm.*
3. *That, the chairperson at Sumbawanga District Land and Housing Tribunal erred in law and fact by not considering the time of recovery of land.*
4. *That, the evidence of the respondents were (sic) weak compared to my evidence which was strong yet (sic) was ignored.*
5. *That, the trial chairperson did not consider that the respondent (sic). did not call any witness to corroborate with their witness (sic).*
6. *That, I was not fully treated as according to principles of natural justice.*

Due to the above grounds, save for the sixth which he later withdrew, the appellant prayed to the Court that his appeal be allowed, that the

proceedings and the judgment of the District Land and Housing Tribunal for Rukwa at Sumbawanga (the trial tribunal) be nullified and costs to follow the event.

The appeal was heard by way of written submissions pursuant to parties' consensus and the order of the Court issued on 27th day of April, 2023. In compliance with the said scheduled order, the appellant filed his written submission on the 10th Day of May, 2023, the respondents filed their Reply Written submission on the 23rd Day of May, 2023 and finally the appellant filed his Rejoinder Written submission on the 31st day of May, 2023.

In making his submissions before the Court, the appellant had no legal representation, whereas on their part the respondents enjoyed the legal services of Ms. Nuru Stanley, learned Advocate.

The appellant opted to argue the first, second and third grounds of appeal together and submitted that the trial tribunal misdirected itself in deciding the matter in favour of the respondents on the ground that the appellant had failed to bring one Godfrid Ntapula as a material witness, because the said witness had a dispute with the same respondents in land application No. 39 of 2020 and before the said trial tribunal, hence

he could not turn up to testify as he was also invaded by the respondents in his land.

The appellant also submitted that he proved his case before the trial tribunal on the balance of probability as required of him under section 110 of the Evidence Act, Cap 6 R.E 2019(the TEA) because his evidence was well corroborated by his two witnesses; hence the trial tribunal ought to have found credence on the evidence adduced by his side as per the principle stated in the case of **Goodluck Kyando vs Republic** [2006] T.L.R. 362 CAT.

He further submitted that he had been in possession of the suit land from 1990 up to 2020, when the dispute arose meaning that he was in undisturbed possession of the suit land for about thirty years, the fact which was ignored by the trial tribunal. He concluded on that point by submitting that failure by the trial tribunal to consider that fact had occasioned miscarriage of justice on his part which is his main complaint in the present appeal.

He cited the cases of **Shaban Nassor vs Rajab Simba** (1967) HCD No. 233 and **Thomas Matondane vs Didas Mwakalile & 3 Others** [1987] T.L.R. 210 with a view of reaffirming the principle that a person is

entitled to the disputed land by adverse possession as he had been in undisturbed occupation of the same for a long period of time.

Turning to the fourth and fifth grounds of appeal which he also proposed to argue together, the appellant submitted that trial tribunal misdirected itself by believing the testimony of the respondents that the appellant was granted the suit land in the year 2000.

He however, contended that no proof was tendered by the respondent before the trial tribunal to the effect that the appellant was allocated the suit land and they failed to mention the name of a person who granted the same to the appellant.

He added that the respondents did not claim the suit land when their elders were still alive and it is not clear as to why they want it now after a lapse of more than twenty years since they claimed that the suit land was allocated to the appellant, the fact which has no proof.

It was further submitted by the appellant that the respondents' invasion into the suit land which had been occupied by him since 1990, was unjustifiable because according to the Law of Limitation Act, Cap 89 R.E. 2019, the time limit for recovery or redeeming the land is twelve years, but according to the records of the trial tribunal, the main suit was filed

in the year 2020. That the same court records also show that the suit land was not under possession of any of the respondents.

In conclusion, the appellant submitted that it was a gross error for the trial tribunal to ignore the appellant's evidence who had been in occupation of the suit land for a long period of time making the same to become his property by virtue of being in long occupation of the suit land for a long time. He added that the respondents are barred by the doctrine which permits a person to acquire an interest in the property by long undisturbed possession and use.

In the end, the appellant humbly prayed that this court be pleased to allow his appeal by quashing and setting aside the judgement and decree of the trial tribunal vide Land Application No. 40 of 2020 and declare the appellant the sole lawful owner of the land in dispute.

In reply, the respondent counsel submitted in respect of the appellant's first ground of appeal that the trial tribunal was correct to decide in favour of respondents since the appellant failed to call a material witness contrary to the principle of law that the one who alleges must prove his case as provided under section 110(1) (2) of TEA. The cases of **Geita Gold Mining Limited and Others vs Ignas Athanas**, Land Appeal No. 122 of 2015 and **Antony M. Masanga vs Penina (Mama Mgesi)**

& Lucia (Mama Anna), Civil Appeal No. 118 of 2014(both unreported), were cited by the respondent counsel to cement the above position.

The respondents counsel added that the appellant failed to prove his case before the trial tribunal which rightly found his evidence as being weak compared to the respondents' because the first appellant's witness had interest of his own to serve; hence it was not proper to act on that evidence in absence of corroboration from another independent evidence.

Arguing in respect of the second ground, the respondents counsel submitted that the appellant did not obtain the suit land by any way recognizable by the law as it is undisputed that he was an invitee who was permitted by PW2 as the member of Fwamba's family; hence he cannot claim possession of the suit land by way of adverse possession. The learned counsel cited the case of **Laurent Mwang'ombe vs Tatu Haji Mwambisile**, Civil Appeal No. 358 of 2019 where it was held that:

> *"An invitee cannot own the land despite the length of time he stayed on the particular land."*

It was also the submission of the counsel for the respondents that the law of limitation cannot be applied in the circumstances of the present case because there was an invitation of the appellant to the suit land

and it is a principle of law that no invitee can exclude his host whatever the length of his occupancy on the piece of land.

To fortify the above position, the learned counsel made reference to the case of **Laurent Mwang'ombe vs Tatu Haji Mwambise** (supra) and argued that there was no time at all for the respondents to recover the suit land since the said land belongs to them from the beginning.

In distinguishing the two cases of **Shaban Nassor vs Rajab Simba**(supra) and **Thomas Matondane vs Didas Mwakalile** (supra) cited by the appellant, the respondents' counsel submitted that in those cases the issue of invitation to the suit land was not the centre of discussion compared to the instant case where it is obvious that the appellant was invited to use the suit land.

Submitting in respect of the fourth ground of appeal, the respondents' counsel contended that the evidence of the appellant was not stronger than the one adduced by the respondents because the evidence of PW2 who is the appellant's father had his own interest to serve and his evidence lacked corroboration; hence his evidence could not be relied upon. She cited the case of **Abraham Sagurani vs Republic** [1981] TLR (without mentioning the page number). According to the learned

counsel, in that case it was held and I quote from page 4 of her respective written submission, that:

> *"...evidence of a person with an interest of his own to serve must be approached with court (sic) and should (sic) be acted upon unless collaborated by other independent evidence"*

In addition to the above, the respondents' counsel submitted that also the appellant's second witness was a neighbour who was not even aware on that time the appellant acquired the suit land and he lives far from it hence he could not know how the appellant acquired the said land. To her, that also shows how weak the appellant's evidence was.

On the fifth ground of appeal by the appellant, the respondents' counsel submitted that the same is baseless because the appellant who instituted the main suit was the one duty bound to prove his case against the respondents as required of him under the provisions of section 110 (1) (2) of TEA and also as per the case of **Anthony M. Masanga vs Penina** (supra) and **Hemedi Said vs Mohamed Mbilu** (supra).

She further submitted that in their evidence, the respondents defended their case by adducing evidence on how the appellant found himself in possession of the suit land through being a member of the Fwamba's

family and he did not object the fact that the respondents are his relatives by being a son of their brother who is PW2.

However, to their dismay the appellant began to dispose of part of the suit land to Sukuma people contrary to the family commitment that the same should not be disposed of by the one it was entrusted to.

Re-joining, the appellant submitted that the evidence of the appellant was credible and enough for the trial tribunal to make a finding in his favour arguing that under the law, even a testimony of a single witness may be enough to convince the court to decide in one's favour as per the provisions of section 143 of TEA. Due to that argument, the appellant was of the view that the trial tribunal misdirected itself by drawing an adverse inference on the appellant's evidence for failure to call a material witness.

In regard to the mode of acquisition of the suit land, the appellant reiterated his previous stance by submitting that he has been in undisturbed possession of the same for about 30 years and wonders why the respondents have emerged to claim for it now. He was of the view that the trial tribunal ignored that fact without any justification.

He further submitted that the trial tribunal failed to consider that the respondents did not testify as to who granted him the suit land despite

alleging that the appellant was granted the same in the year 2020, and added that there was no evidence from the respondents to substantiate the fact that he was a mere invitee to the suit land. He thus, reiterated his submission in chief that he justified the ownership of the suit land since 1990 when he acquired it.

From the foregoing reasons, the appellant humbly prayed to this court to allow the instant appeal by quashing and setting aside the judgment and decree of the trial tribunal and declare him as a lawful owner of the land suit land.

The above being the rival submissions by the parties herein, I wish to say that I have paid much consideration not only to the said submissions, but also to all the grounds of appeal by the appellant as well as the authorities cited by both parties in the course of making their respective submissions before this court.

Since it appears that the centre of the dispute between the parties herein is on the reasons used by honourable chairperson of the trial tribunal to decide in favour of the respondents and declare them as lawful owners of the suit land, this being the first appellate court, I am constrained to go back to the roots of the main case and re-evaluate the

evidence adduced by both parties in order to see whether the said trial tribunal was justified in arriving to such decision.

As per the records of the trial tribunal, when the main suit was called on for hearing, the plaintiff had three witnesses himself being inclusive, whereas the respondents' side had five. While the appellant testified as PW1, the rest of his witnesses who were Jacob Msangano and Vicent Siame, testified as PW2 and PW3 respectively.

According to the evidence of PW1, he acquired the suit land in 1990 and cleared it when it was a bare land. At the time he was acquiring the same, he was with one Godfrid Ntapula. He continued to utilize the same until 2020 when the respondents emerged and claimed the same to be theirs. He also testified that the said land belongs to him because he had been in undisturbed occupation of the same for almost thirty years.

His evidence was followed by the evidence of PW2 who testified that the suit land was acquired by the appellant and one Godfrid Ntapula when it was a bare land. Next to the above applicant/ appellant's witness was PW3 who testified that the suit land who testified that the suit land was acquired by the applicant/appellant and one Godfrid Ntapula in 1990 as it was a bare land and they began farming on it until 2020, when he was

chased by the respondents from a piece of land, he was given by one Godfrid Ntapula claiming the said land belong to them.

During cross examination PW1 said he is 53 years old. He acquired the suit land since 1990. He cleared the suit land as it was a bush. He was with Ntapula. He cleared the suit land in 1990 and began farming activities. The suit land is 100 acres. PW2 said he saw the applicant/ appellant acquiring the suit land.

That the applicant/appellant has used the suit land for thirty (30) years. Also, when cross examined, PW3 said the applicant/appellant and Godfrid Ntapula told him, as a resident of Ntemba Village, that they acquired the suit land. He borrowed a parcel of land from Godfrid Ntapula which he used for garden farming.

On their side the respondents who testified as DW1, DW2, DW3, DW4 and DW5, had it that the suit land belongs to Fwamba's family to which they all belong to. According to the testimony of DW1 which was also repeated by his fellow witnesses, the suit land is 333 acres. Initially it was belonged to their grandfathers, but after their demise, it was entrusted to their senior brother to take care of it on condition that it should not be sold to anyone.

They added that after the death of their senior brother, the suit land was entrusted to their junior brother who is PW2, a father of PW1(the appellant herein). According to the evidence of the respondents SM1 sold the suit land to Sukuma people. They further testified that after disposal of the suit land to Sukuma people, they complained to the chief who decided in their favour and ordered the said Sukuma people to vacate the land and PW1 to handle it back to them.PW1 was aggrieved and decided to sue them in the trial tribunal.

The respondents also complained that PW2 who is their brother betrayed them by siding with the appellant, but according to them, the suit land belongs to them as members of Fwamba family. Hence, they urged the trial tribunal to dismiss the appellant's claim and declare them as lawful owners of the suit land. They also said that the size of the suit land is 333 acres.

During cross examination the respondents said that the suit land belongs to Fwamba family. The appellant did not acquire it in 1990. He is a trespasser.

In her judgment, the trial chairperson found that the appellant failed to call a material witness who is Godfrid Ntapula, to corroborate his testimony on how he acquired the suit land, and that PW2 who is his

biological father, was a witness with own interest to serve, hence his testimony was supposed to be corroborated by another independent evidence.

Based on the above two reasons, the trial chairperson was of the view that the appellant (who the plaintiff in that case) failed to prove his case on the balance of probabilities as required of him under section 110 of TEA.

Before this court the appellant has insisted that he proved his case as required of him by the law, and that the respondents' evidence has not proved that he was an invitee to the suit land. As for the respondents' argument that his failure to call a material witness one Godfrid Ntapula indicates that he failed to prove his case, the appellant has come with two reasons to dispute that argument.

First, he has submitted that the said witness could not come to testify for him because he also has grudges with the respondents who invaded his land just as they did to him. His second reason is that it is not necessary for him to have more than one witness in order to prove a certain fact. He has referred the provisions section 143 of TEA to cement his argument.

With the above evaluation of evidence by both sides before the trial tribunals, it is crystal clear that none of the respondents testified that the appellant was invited by PW2 to utilize the suit land. Had that evidence been adduced by the respondents, one would have expected the typed records of the trial tribunal to display that piece of evidence.

Also, had it been true that the appellant was so invited, the respondent's counsel could have cross examined PW2 on that respect and also PW2 who the respondents have blamed for siding with applicant/appellant would join hands with the respondents on that fact. In the absence of evidence to show that the appellant was an invitee to the suit land, which could have affected the appellant's claim over the suit land under the principle stated in the case of **Laurent Mwang'ombe vs Tatu Haji Mwambisile**(supra), I am of the settled that the fact that the appellant was invited by PW2 into the suit land, is a mere statement from the bar which under the eyes of the law, cannot be acted upon by this appellate court. (See **Farida F. Mbarak and Another vs Domina Kagaruki & 4 Others**, Civil Reference No. 14 of 2019, CAT at Dar es Salaam (unreported).

Reverting back to the grounds of appeal by the appellant, the appellant has argued on five grounds of appeal after dropping the sixth ground, I

as have pointed above. On my side, after having gone through the remaining grounds of appeal, I am of the opinion that the fourth ground of appeal is enough to dispose of the present appeal.

This is because, the first, second, third and fifth grounds of appeal are all relating to the fourth ground which focuses on the standard of proof in civil cases. The said decisive ground of appeal is to the effect that the evidence of the respondents was weaker compared to the appellant's which, however being strong, was ignored by the trial tribunal.

As I have alluded herein above, there were two reasons the trial chairperson used to dispose of the main suit in favour of the respondents. The first one was that the appellant failed to call a material witness, hence failed to prove his claim against the respondents. With respect to the trial chairperson and the counsel for the respondents, that proposition is misconceived and misplaced.

It is true that the appellant did not bring Godfrid Ntapula to testify for him on how he acquired the suit land in the year 1990. However, that was not the only material witness the applicant/appellant could bring before the trial tribunal in order to corroborate the evidence of PW2 on how the appellant acquired the suit land.

The typed proceedings of the trial tribunal can help to justify that court's observation. For instance, at page 5 of the said proceedings PW3 was recorded to have stated that:

> *"The suit land was acquired by the applicant and Godfrid Ntapula in 1990 as it was a bare land and they began farming the same until in 2020 ..."*

Also, at page 9 of the impugned typed judgment of the trial tribunal, the honourable chairperson wrote that:

> *"SM3 aliunga mkono ushahidi wa SM1 na SM2 kwa kueleza kuwa wakati SM1 anaanza kumiliki eneo hilo alikuwa na Godfrid Ngapula(sic) lakini mtu huyu hakuitwa kutoa ushahidi wake kuunga mkono madai haya"*

In a literal translation, the trial chairperson of the trial tribunal observed that PW3 corroborated the evidence of PW1 and PW2 by testifying that PW1 was with one Godfrid Ntapula when he began to acquire the suit land.

From the above excerpts, it is obvious that not only the evidence of the appellant was well corroborated by PW2 and PW3, but also the evidence

of PW2 received corroboration from the independent evidence of PW3 who had no interest of his own to serve.

In the circumstance, and due to the above reasons, it is my considered opinion that the allegations that the appellant failed to bring a material witness and that the evidence of PW2 fell short of being corroborated by another independent evidence, are unfounded. Hence, it cannot be said that the applicant/appellant failed to prove his case against the respondents.

That apart, it is the respondents' view that the suit land belongs to them by virtue of being members of the Fwamba family. However, I have observed from the records that their evidence does not reveal their grandfathers' name whom they claimed to have been the owner of the suit land, nor does it show when and how the suit land was acquired by their late grandfather. That leaves a doubt whether their evidence before the trial tribunal was credible and true.

It is my firm view that the provisions of section 110 of TEA cuts across both sides because it requires the one who alleges existence of a certain fact to prove its existence on a balance of probability. Now, since the respondents alleged that the suit land belonged to their grandfather, it was also their duty to prove on the balance of probabilities who exactly

was the owner of the suit land and how he acquired the same, instead of arguing generally that the suit land belongs to Fwamba family.

That alone would be enough for me to hold that even if I were to use a weighing machine, it is the appellant's evidence that would tilt down than the one adduced by the respondents. However, I find it pertinent to point another discrepancy I have observed from the respondents' evidence.

It is glaring from the records that according to Application No. 40 of 2020 which is the subject of this appeal, the suit land claimed by the applicant/appellant is composed of one hundred acres (100), and it is situated at Ntemba Namanyele at Nkasi District. This can be inferred from paragraphs 3 and 6 of the applicant's application whereby at page 3 it is stated as hereunder: -

> *"Location and address of the suit premises NTEMBA NAMANYELE,"*
>
> *And, at paragraph 6 of the said application form it is stated as follows: -*
>
> *"Cause of action/ brief statement of facts constituting the claim...WAMEVAMIA ENEO LANGU LA SHAMBA NA KUNITISHIA KUWA MWAKA HUU HAKUNA KULIMA...SHAMBA HILO*

LIMEVAMIWA TAREHE 6-4-2020 SHAMBA AMBALO NILIWENZA (SIC) KULIMILIKI MWAKA 1990 LENYE UKUBWA WA EKALI (100) THAMANI YA SH. 100,000,000/= SHAMBA HILO NIMEKUWA NIKILITUMIA KWA MUDA WOTE BILA KULALAMIKIWA NA MTU YOYOTE YULE."

Literally translated, under paragraph 6 above the applicant/appellant complained that on the 6th Day of April, 2020 the respondents invaded into his 100 acres which he had been cultivating since 1990 without being disturbed by anyone, and threatened him that he will not do any farming activities in the year 2020. That the said land is worthing Tshs. 100,000,000/=.

Surprisingly, instead of directing themselves on the applicant/appellant's claim and challenge the same, the respondents testified that the suit land is composed of 333 acres and it is located at a place called Sepeminamba, which tells that the respondents were not focused at all in their defences.

Worse still, I have noted that even the trial chairperson fell on the same trap in composing her judgment when she declared the respondents as lawful owners of the suit land without resolving the disputed fact in relation to the size of the suit land.

In my view, after realizing that the parties were disputing on the size of the suit land, the chairperson ought to have determined first whether the suit land is composed of 100 acres, instead of determining who was the rightful owner of the suit land, which I think ought to be the second issue after resolving the dispute in relation to the size of the suit land. The omission to do that leaves confusion in that impugned judgment; whether it is 100 or 333 acres.

With the foregoing reasons, I am of the settled view that the respondents' evidence failed to outweigh the evidence of the applicant/appellant who as I have pointed above, managed to prove his case including the size of the suit land, on the balance of probabilities. Having said the above, and due to the aforementioned reasons, I find the fourth and decisive ground of appeal to have merit.

With the foregoing reasons, the present appeal is allowed with costs. I nullify the proceedings of the WT and the appellate tribunal. In consequence thereof, the respective judgements of the lower courts are hereby quashed, the orders passed thereto are set aside and the appellant herein is declared a lawful owner of the suit land.

It is so ordered.

A.A. MRISHA
JUDGE
29.09.2023

DATED at **SUMBAWANGA** this 29th Day of September, 2023.

A.A. MRISHA
JUDGE
29.09.2023