

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

MISC. LAND APPEAL No. 21 OF 2022

(Originating from Land Dispute No. 06 of 2021 of Kate Ward Tribunal and Land Appeal No. 32 of 2021 of the District Land and Housing Tribunal for Rukwa at Sumbawanga)

OSWARD KILUMBA.....APPELLANT

VERSUS

IMELDA MWANISAWA.....RESPONDENT

JUDGMENT

21/06/2023 & 12/10/2023

MWENEMPAZI, J.:

This is the appellant's second bite after being aggrieved by the decisions of the two lower tribunals, which are the Ward Tribunal of Kate (trial tribunal) and the District Land and Housing Tribunal for Rukwa at Sumbawanga (first appellate tribunal) over the ownership of a land located at Kate village, in which both tribunals declared the respondent as the lawful owner of the disputed land.

In the attempts of overturning the table, the appellant filed this appeal which consisted of five (5) grounds of appeal which are reconstructed as hereunder;

1. That, the appellate tribunal erred in law to entertain the matter which was *nullity ab initio* for failure to show the members who heard the matter day to day as well as the gender of the members.
2. That, the appellate court erred in law by raising the issue of time limitation *suo moto* when composing the judgment without according the parties the right to be heard on the same.
3. That, the appellate tribunal erred in law and fact in evaluating the evidence on ownership of the disputed land which was adduced by the parties hence reached to a wrong decision.
4. That, the appellate tribunal erred in law and facts by upholding the ownership of the respondent under the principle of adverse possession while the essential elements on the same were not proved.
5. That, the appellate tribunal erred in law by holding that respondent was the administratrix of her late father while there was no proof on the same.

Depending on the grounds of appeal, the appellant prays for the judgments of the first appellate tribunal as well as the trial tribunal be quashed and set aside and that he be declared the lawful owner of the disputed land.

The respondent was in denial of all the five grounds of appeal in her reply to the petition of appeal, and she put the appellant in strict proof of every ground thereof.

On the hearing date, the appellant was represented by Mr. Peter Kamyalile learned Advocate, meanwhile the respondent had no legal representation as she fended for herself. Mr. Kamyalile then sought leave of this court for the matter to be heard by way of written submission and this court gladly granted the prayer and scheduled the filing of the submissions in which both parties adhered to.

Mr. Kamyalile started off by stating that, it is the trite of the law that ground of appeal hinged on a point of law, the second appellate court ought to address and determine it on merit even if it was not raised and determined at the first appellate Court/Tribunal. He added that, also the appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the memorandum of appeal.

The learned counsel was of the opinion that, since the first ground of appeal is hinged on the point of law, it is ought to be addressed and determined on merit though it was not raised and determined at the first appellate Tribunal. In insisting on the above position Mr. Kamyalile

referred me to the case of **Adelina Koku Anifa & Another vs Byarugaba Alex, Civil Appeal No. 46 Of 2019, CAT at Bukoba** (Unreported) at page 6- 7 where it was held that:-

"Ground hinged on a point of law as such, the second appellate court ought to have addressed and determined it on merit. It is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of the parties.

The duty of the Court is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below. Where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals."

Mr. Kamyalile then cited Section 11 of the Land Dispute Court Act, [CAP. 216 R.E 2019] which clearly and mandatorily requires that a properly constituted Ward Tribunal shall consist of at least four members and not more than eight members, three of whom being women, and he

related the very section to the case at hand and insisted that the members at the trial tribunal were not properly composed. He added that, the above position was emphasized in the case of **Edward Kubingwa vs Matrida Pima**, Civil Appeal No. 107 of 2018 **CAT at Tabora** at page 4, 5 where it was held that: -

"It has to be emphasized at this very stage that in order for a tribunal or court to pursue any matter before it, the same must be properly constituted otherwise it lacks jurisdiction. The above recited provisions of law clearly and mandatorily require that a properly constituted Ward Tribunal shall consist of at least four members and not more than eight members, three of whom being women."

He then stated that, the proceedings does not show the members who heard the matter day to day as well as the gender of the members is not shown at all. That, the legal impact for non-compliance with mandatory requirement on composition of the ward Tribunal is to vitiate the proceedings and the resulting decision. And that, it renders the trial tribunal to lack jurisdiction to try the case, whereas the remedy is to quash those proceedings, and set aside the judgments in both tribunals below.

He added further by referring to Edward Kubingwa's case (Supra) at page 6-7 where it was held that:-

"The failure and the irregularity by the trial Tribunal to observe the mandatory requirement on the composition of the trial Tribunal, did not only vitiate the proceedings and the resulting decision of the trial Tribunal but it also rendered the trial Tribunal lack jurisdiction to try the case."

In regard to the first ground of appeal, Mr. Kamyalile submitted that, the appellate tribunal erred in law by determining the appeal and basing its decision on the decision which was nullity *ab initio* for failure to show the members who heard the matter day to day as well as the gender of the members.

Coming to the second ground of Appeal, the learned counsel argued that, the appellate tribunal in the course of composing the judgment raised the issue *suo moto* that the matter was filed out of time without according the parties the rights to be heard on the issue when the cause of action accrued and whether the matter was filed out of time or not. That, this is fatal and renders the judgment of the Appellate Tribunal a nullity. He supported his argument by citing the case of **Pili Ernest vs**

Moshi Musani, Civil Appeal No. 39 of 2019, CAT at Mwanza (Unreported)

at page 6 and 7 where it was held that:-

"In the course of composing his judgment posed a question suo motu on whether it was reasonable to entertain an appeal which to him was out of time. He did not invite the parties as he ought to have done, in order to address him on this crucial point which he found necessary in the determination of the appeal before him."

He added that at page 7 the Court held that:-

"We are satisfied that the parties were denied the right to be heard on the crucial question that the first learned appellate magistrate had raised and we are further satisfied that the denial was in violation of the fundamental constitutional right to be heard and the parties were prejudiced. This renders the judgment of the District Court a nullity."

We direct that the case file be remitted to the District Court and be assigned another magistrate who will proceed from the proceedings of 26/8/2013 when the matter was set down for judgment."

Submitting for the 3rd and 4th grounds of Appeal, the learned counsel submitted that, he is aware that the second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. As to this principle, he referred me to the cases of **Neli Manase Foya Vs Damian Mlinga** [2005] T.L.R 167, and **Amratlal Damodar Maltaser And Another T/A Zanzibar Silk Stores Versus A.H. Jariwala T/A Zanzibar Hotel** [1980] TLR 31, where it was held that:-

"Where there are concurrent findings of facts by two court, the Court of Appeal as wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice, or violation of some principle of law or procedure."

Thereafter, he proceeded that, in evaluating the evidence, the first appellate Tribunal violated some principle of law or procedure and that there is misapprehension of evidence which led to miscarriage of justice. He added that, therefore this Court has justification of evaluating the evidence and disturb the findings of the concurrent Tribunals below.

Mr. Kamyalile added further that, the evidence of the respondent on record, shows that she was the administratrix of the deceased's estate, and the disputed land belonged to the deceased in which she was vested with her other capacity as the legal representative of the deceased. That, the respondent was not sued in that capacity as the administratrix of the deceased's estate but was sued personally. To that fact, he stated that it was wrong for the first appellate tribunal to declare that the disputed land belonged to the respondent personally while she did not prove so.

He added further that, failure to sue the administratrix of the deceased's estate, no executable relief could be granted as against her personally with respect to the suit land which was vested in her other capacity as the legal representative. That, the remedy is to render the proceedings and decision nullity and strike out the name of the person who was improperly joined as the defendant in her personal capacity and order a trial de novo. In support of his argument, he referred me to the case of **Abdullatif Mohamed Hamis Versus Mehboob Yusuf Osman And Another**, Civil Revision No. 6 Of 2017, CAT at Dar Es Salaam (Unreported) at page 27-28 where it was held that:

"It is beyond question that the 2nd respondent was, at all material times the administratrix of the deceased's estate. ...

the suit land was vested in her in her capacity as the legal administratrix. ... the 2nd respondent was not sued in that capacity, instead, the 1st respondent sued her in her personal capacity and, for that matter, no executable relief could be Scanted as against her personally with respect to the suit land which, as it turns out, was vested in her other capacity as the legal representative."

He then added further that the Court also at page 28 it held that:-

"Thus, although not raised as an issue during the trial, a material question regarding the constitution of the suit below presents itself in relation to the legal status of the 2nd respondent. To say the least, the plaint was incurably defective for the non-joinder of the legal representative of the deceased who was, so to speak, a necessary party."

He did not end there, the learned counsel added that, the Court further at page 29 and 30 it held that:-

"Indeed, the non-joinder of the legal representative in the suit under our consideration is a serious procedural in-exactitude which may, seemingly, breed injustice. The question which presently confronts us is as to what need be done. To us, there

can be no option for the amendment of the plaint at this stage and the only viable option is invoke the revisional jurisdiction of the Court and do what ought to have been done by the trial court, that is: Strike out the name of the 2nd respondent who was improperly joined as the defendant in her personal capacity. Having done so the entire proceedings below in her personal capacity. Having done so the entire proceedings below crumble just as the judgment on admission and the resultant decree follow suit and are, hereby, set aside. This matter is, accordingly, pushed back to where it was immediately before the institution of the suit."

He stressed further that, it is the position of the law that possession and occupation of land for a considerable period of time do not, in themselves, automatically give rise to a claim of adverse possession or being in occupation of the disputed land for 12 or more years is only one of many factors to be cumulatively proved by a person seeking to acquire land by adverse possession. He clarified further that, the other factors to be cumulatively proved by a person seeking to acquire land by adverse possession was laid down in the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamill Shayo & 136 Others**

Respondents, Civil Appeal No. 193 Of 2016, CAT at Arusha, and Evalist Kanoni vs Audifasi Chenga, Misc. Land Appeal No. 13 Of 2020, HC of TANZANIA (LAND DIVISION) at Sumbawānga (Unreported) at page 2, 3, 4 this Court held that:-

"The only issue for determination is whether the doctrine of adverse possession was correctly invoked in the circumstances of this case. As a matter of principle being in occupation of the disputed land for 12 or more years is only one of many factors to be cumulatively proved by a person seeking to acquire land by adverse possession. The following are the factors:

- (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 animus possidendi;

(f) That, the statutory period, in this case twelve years, had elapsed;

(g) That, there had been no interruption to the adverse possessor through the aforesaid statutory period and,

(h) That, the nature of the property was such that in light of the foregoing, adverse possession would result.

Mr. Kamyalile proceeded by submitting that, since the respondent testified to have had the right of entry as the heir, or inherited the suitland from her father, then, she cannot again claim to be the owner of the disputed land through adverse possession. That, it was wrong or unjustifiable for the appellate tribunal to declare the respondent as the lawful owner of the disputed land under the principle of adverse possession while there was absence of cumulative proof of the factors listed hereinabove on part of the respondent. He again referred me to the case of **Evalist Kanoni** (Supra) at page 4 where this Court held that:-

"According to the respondent's own testimony before the trial tribunal, he inherited the suit land from his father, the late Anotory Chenga who bought the land from other person.

Therefore, since the respondent testified to have had a right of entry as an heir, he cannot again claim to be the owner of the disputed land through adverse possession. In the absence of cumulative proof of the factors listed hereinabove on hart of the respondent, it was unjustifiable for the appellate tribunal to reverse the decision of the Ward Tribunal."

In winding up ground 3 and 4, he submitted that the evidence adduced by the appellant, and his witnesses proved that the disputed land is owned by the appellant. That, it was owned since in memorial by Kilumba family then appellant got it from his aunt.

Submitting for the last ground of appeal, the learned counsel argued that Letters of administration being an instrument through which the respondent traces her standing to be sued was in his view an essential document to be tendered. That, in the absence of it the Court cannot have any factual basis to imply the asserted representative capacity, since it is only the lawful appointed legal representative of the deceased who can sue or be sued for or on behalf of the deceased. In support of his argument, he cited the case of **Omary Yusuph (Legal Representative of the late Yusuph Haji) vs Albert Munuo, Civil Appeal No. 12 Of**

2018, CAT at Dar-es-Salaam (Unreported) at page 6 where it was held that:-

"In this particular case, since Yusuf Haji had passed away, according to the Law it is only the lawful appointed legal representative of the deceased who can sue or be sued for or on behalf of the deceased which is stipulated under the provisions of section 71 of the Probate and Administration Act [CAP 352 R.E.2002]"

As he penned off, Mr. Kamyale submitted that basing on the Submission above and the plethora of relevant authorities pinned in, he prays for the judgment of the District Land and Housing Tribunal as well as of the Ward Tribunal be quashed and set aside and the appellant to be declared the lawful owner of the disputed land, and payment of the costs of this appeal be borne by the respondent.

In response to the submission made by the appellant, the respondent submitted that the genesis of this dispute arose in 2021 at Kate ward tribunal where the tribunal after full trial gave merit on her favour. That, the appellant was not satisfied with the judgment and orders of the trial tribunal hence appealed to the District Land and Housing Tribunal for Rukwa in which grounds of appeal and reply thereon were

presented in writing, during hearing of the appeal parties made oral submission where by the appellate tribunal upheld the judgment and orders of the trial tribunal.

She proceeded that, if one traces the genesis of the dispute it will be noticed that the respondent's father was in full occupancy and use of the disputed area since 1982 until 2004 when he died, and that is when the respondent was appointed the administratrix after going through all legal compliances.

The respondent proceeded further that, from 1982 when the Respondent's father started utilizing the disputed land up to 2021 when the dispute arose is exactly 39 years. She then sought leave of this court to share legal understanding on the disputed land, and referred me to the book "**LAND TENURE AND POLICY IN TANZANIA**" by **R.W JAMES** at page 184. Where it has been intimated that traditionally security of tenure under customary system is dependent on land utilization. That, Allocation of land was made to members of tribe or clan according to their needs and they were expected to use the land. That, this is also the position in this dispute as the disputed land belonged to her late father who was in full use of the disputed land.

She added further that at page 262:-

"Occupation and use of land for an undue length of time raises prima facie of title, this applies between parties with no prior legal relation holders disputing the boundary of their lands."

The respondent argued that, in such cases the courts take the view that the party out of occupation of the disputed portion must prove a clear and unequivocal title, that failing to do so it will give the judgment in favour of the occupier. That, the justification for the courts attitude is that if P observes that B is occupying his land without permission, P should prosecute an action promptly in order to establish his title. That, an undue delay raises assumption that P's claim is not well founded; while at the same time it lends an aspect of genuineness to the claim of a person in occupation who has been allowed to remain in possession of the land for long time without being challenged.

Arguing further, she stated that at page 263, historically the presumption under consideration has its roots in a judgement of a central court of appeal in 1952, deciding an appeal from a case which originated in Moshi. That, the court held that, in a claim for kihamba if one of the parties has been in occupation for long time it is not sufficient for the claimant to establish a shadowy title and in the absence of his establishment a clear title judgment would be given in favour of the

occupier. She continued that; the statements were made in very general terms. That, certain refinements were expressed in 1954 by the same court in an appeal from Ngara District. That, in this latter case the Court held that it was at liberty any suit as "time barred" when the disputed transaction giving rise to the suit originated so long ago that the evidence for necessary for a proper decision is no longer available of where no adequate reason is shown why the case was not brought to court before as in this dispute.

The respondent also argued that one related rule of evidence concerning proof of title is that ownership may be inferred from certain acts of enjoyment of land by the occupier, such as planting permanent trees, demarcating the boundary of land, constructing fences, which are tantamount rights of the owner and not allowed by rules of customary law to an occupier holding limited interest.

Relating arguments with this case at hand, the respondent stated that her side has been in full enjoyment of the disputed land from 1982 until 2021 when the dispute arose for the first time. Whereas the law is very clear in "The customary law (Limitation of proceedings) Rules 1963 "that proceedings to recover possession of land shall be commenced

within 12 years. She referred me to the case of **Shaban Nassor vs Rajab Simba HCD 233**, which illustrated that:-

"The court is reluctant to disturb persons who have been in occupation of the land for long period."

She winded up that, this resembles with this matter as the respondent has been in the occupation of the disputed land for 39 years.

In rejoinder, Mr. Kamyalile submitted that, in reply to the Respondent's submission, his side recapitulates the earlier submission filed in this Court on 30/05/2023. That, it was wrong for the appellant to sue the respondent at the ward Tribunal in her own capacity instead of pursuing action against her as the administratrix of her deceased father.

That, since the respondent was wrongly sued by the appellant in action involving the estate of her deceased father, the proceedings before both tribunals were vitiated. Mr. Kamyalile referred me to the case of **Malietha Gabo vs Adam Mtengu, Civil Appeal No. 485 Of 2022**, the CAT at Kigoma (Unreported) at page 9 where it was held that:-

"On our part, in the event the appellant was the administratrix, it was irregular for the respondent to initiate a case against appellant in her own capacity instead of pursuing action against

her as the administratrix of the late Gabo Mtengu. We are fortified in that regard because the only person who can act as a representative of the deceased, is the grantee of the letter of administration."

He added that, the Court further at page 10 held that:-

"... the appellant who was the administrator was wrongly sued by the respondent in action involving the estate of her deceased father, the proceedings before both tribunals were vitiated and so was the appeal before the High Court. Thus, the resulting judgments cannot be spared and as such, we nullify the entire proceedings and judgments of the two tribunals and the High Court. Consequently, the appeal is merited and it is allowed."

The learned counsel proceeded that, according to the evidence on record which shows that there is omission to give description of the suit property, that it is a trite of the law that a decree which does not describe the suit property cannot stand since it went to legality of the decision. That, when one reads the judgments of the trial tribunal as well as of appellate Tribunal, it could not lead to discovery of any description of the suit property.

In supporting his arguments, Mr. Kamyalile again referred me to the case of **Hamis Hassan Mkalakala (Administrator of the Estate of the late Said Seleman Mkalakala) vs Paulo Mushi, Civil Application No. 590/17 of 2021**, CAT at Dar es Salaam (Unreported) where it was held that:-

"... is omission to give description of the suit property. My quick reading of the judgment of the trial tribunal could not lead to discovery of any description of the suit property. Whether a decree which does not describe the suit property can stand is a question which goes to the legality of the decision."

In conclusion, Mr. Kamyalile prayed for the judgements of the trial tribunal and that of the first appellate tribunal be quashed and an order for a trial de novo.

I have thoroughly gone through the submissions made by both sides as well the records of appeal before me. In disposing of this appeal, it is my strong holding that the only determinant feature to be dealt with is **whether this appeal is meritorious before this court.**

As correctly submitted earlier by the learned counsel, Mr. Kamyalile that the second appellate court should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is

obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. My determination of this appeal will indeed be confined under the above principle.

When one goes through the grounds of appeal as filed by the appellant and exhaustively submitted by the learned counsel, Mr. Kamyalile, it would be noticed that ground number one and number five suffices to dispose of this appeal amicably here at this court. The very grounds read as follows;

GROUND ONE:

"That, the appellate tribunal erred in law to entertain the matter which was nullity ab initio for failure to show the members who heard the matter day to day as well as the gender of the members."

GROUND FIVE:

"That, the appellate tribunal erred in law by holding that respondent was the administratrix of her late father while there was no proof on the same."

Under Section 11 of the Land Dispute Court Act, [CAP. 216 R.E 2019] which clearly and mandatorily states that a properly constituted Ward Tribunal shall consist of at least four members and not more than eight members, three of whom being women. In perusing the records of appeal specifically the trial tribunal's proceedings, there is no where that the tribunal has indicated neither the number of the members present in the day-to-day hearing of the matter brought before them nor their names. But it only generally referred to them as "WAJUMBE WA BARAZA" specifically when cross examining the witnesses. Nevertheless, the judgment of the trial tribunal has the list of all the members who were present during the deliverance of the said judgment, and I find it best to reproduce the exact phrase as follows;

*"MAAMUZI HAYA YAMETOLEWA MBELE YA WAJUMBE WAFUATAO
TAREHE 11/06/2021*

- 1. LEONARD KANYEPO-MWENYEKITI*
- 2. EDES MBALAMWEZI-KATIBU*
- 3. VITUS MONELA-MJUMBE*
- 4. SOSIPITA KAWITI-MJUMBE*
- 5. CHRISTINA MWANAMBOGO-MJUMBE*
- 6. LEDEMTA MWAMI-MJUMBE*

7. *MARY KANKOMA-MJUMBE*"

(See Last Page of the typed proceedings of the trial tribunal)

It is unfortunate that there is no where in the said records that reveals the number and names of the members present during the hearing of the particular application.

As it was well elaborated by the learned counsel as he cited the case of **Edward Kubingwa vs Matrida Pima** (supra) where it was stated that: -

"It has to be emphasized at this very stage that in order for a tribunal or court to pursue any matter before it, the same must be properly constituted otherwise it lacks jurisdiction. The above recited provisions of law clearly and mandatorily require that a properly constituted Ward Tribunal shall consist of at least four members and not more than eight members, three of whom being women."

Coming to the fifth ground, indeed it was wrong for the appellant to sue the respondent at the ward tribunal in her own capacity instead of suing her as the administratrix of her deceased father's estate. The remedy in doing so is that, there would never be an executable order against the party which was wrongly sued.

In this, again I do join hands with the submission made by the learned counsel that, since the respondent was wrongly sued by the appellant in action involving the estate of her deceased father, the proceedings before both tribunals were vitiated and he cited the case of **Malietha Gabo vs Adam Mtengu** (supra) at page 9 where it was held that:-

"On our part, in the event the appellant was the administratrix, it was irregular for the respondent to initiate a case against appellant in her own capacity instead of pursuing action against her as the administratrix of the late Gabo Mtengu. We are fortified in that regard because the only person who can act as a representative of the deceased, is the grantee of the letter of administration."

At this juncture, I do hold this appeal to be meritorious and proceed to allow it, as the first and the fifth grounds of appeal sufficed to determine this appeal amicably, and I do not find any reason in dealing with the other three remaining grounds.

Consequently, I therefore proceed to quash both judgements of the trial tribunal and the first appellate tribunal, and order a trial de novo at

the District Land and Housing Tribunal for Rukwa at Sumbawanga.

I make no orders as to costs.

Ordered accordingly.

Dated and delivered at **Sumbawanga** this 12th day of October, 2023.



T. M. MWENEMPAZI

JUDGE

Judgment delivered in Court in the presence of the appellant in person, Mr. Peter Kamyalile, Advocate for the appellant and Imelda Mwanisawa, the Respondent.

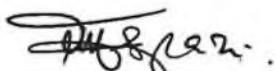


T. M. MWENEMPAZI

JUDGE

12/10/2023

Right of appeal explained.



T. M. MWENEMPAZI

JUDGE

12/10/2023