

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MTWARA
AT MTWARA**

LAND APPEAL NO. 17 OF 2023

(Arising from the District Land and Housing Tribunal for Mtwara at Mtwara in
Land Application No. 38/2020 dated 31st March, 2023)

**CONSTANTINE WILLIAM AMLIMA (Administrator of the Estates of the
Late Berfold Amlima) ----- APPELLANT**

VERSUS

**HORACE COSMAS BONGA (Administrator of the Estates of the Late
Joseph Cosmas Bonga) ----- RESPONDENT**

JUDGEMENT

Date of last Order: 23.08.2023

Date of Judgment: 17.11.2023

Ebrahim, J.

The herein appellant filed an instant appeal challenging the decision of the District Land and Housing Tribunal for Mtwara at Mtwara (the DLHT) made in Land Application No. 38 of 2020 dated 31st March, 2023. Before the District Land and Housing Tribunal the appellant sued the respondent for unlawfully invasion of the suit land and the unlawful transfer of the title of ownership. The subject matter is the

surveyed land in Plot No. 7 Block "HH" Chikongola within Mtwara Municipal Council (to be referred to as the disputed land).

It was alleged that the respondent acquired the disputed land by way of purchase from the wife of the late Bertold Amlima now the deceased. It was further alleged that the late Bertold was thus a first person to own the land way back in 1988. The land is under the survey plan MT/836/23/CKK that was registered on 03.10.1983. The dispute is on the plot where it was alleged that the respondent invaded on the disputed land and unlawfully transferred the title of ownership by inviting his relatives to dwell in the disputed land.

The appellant testified as SM1. He told the trial Tribunal that the owner of the disputed land is the late Bertold Amlima and he is the administrator of his estates. He testified further that he made a follow up at the land office of Mtwara Mikindani Municipal council asking as to who is the owner of the disputed land and the land officer informed him that the suit land of the late Bertold has been sold. He was shown all the documents but he did not know who sold the disputed land but he heard that the late Joseph Bonga purchased the disputed land from Padre Idelphone who is now a

deceased. SM1 went to ask to the Padres who told him that they have not bought the suit land. He further testified that the late Bertold was working with Padre Idelphone so he built the disputed land by using his money and the late Bertold was staying there. SM1 tendered **exhibit P2** (a letter from DED of Mtwara Mikindani Council) which introduces the appellant to the police so as to report on the loss of the documents of Plot No. 7 Block "HH" Raha leo. The appellant called one **Rita Constantine Amlima** as his witness who testified as **SM2**. SM2 told the trial Tribunal that the suit land was a legal property of the late Bertold Amlima. She witnessed in 1988 when she went to stay with him at the suit land. In 2012 her husband was transferred to Mtwara City and it was unfortunately that the broker (dalali) found them a rental house to rent which happened to be the suit land. Later on, they saw the electricity and water bills which still has the name of the late Bertold Amlima. Benjamini Bonga who was the son of the late Joseph Cosmas Bonga told her that his father was allowed by the church to stay in that house because he was the Catechist. Due to that she called her father and told him that the suit land was not sold. In 2013 they moved away from the

suit land and went to Nanganga to inform the appellant so as to make follow up on the ownership of the suit land. She further testified that she was informed by Benjamini Bonga that the late wife of the late Bertold Amlima moved to Babati and took the keys of the suit land following the death of her husband. It was when the late Bonga and his family went to stay at the suit land. **SM3, Remedius Jolin Mtunguja** told the trial Tribunal that he heard the suit land is at Majengo, Mtwara but he has never been there. He testified to be at Majengo, Mtwara in July, 2020. SM2 and SM1 went to his office at the church alleging that there was a house dispute of which Padre Victor was aware. They wanted to know if he knew about it. He called Padre Victor and asked him but he denied knowing anything about the suit land and not to have any document concerning the suit land.

Defending his position, the respondent testifying as **DW1** told the trial Tribunal that the suit land was the property of the late Joseph Cosmas Bonga of which he purchased it in 1992 but he does not remember from who and he has never seen the purchase agreement. He testified that it is not true that his late father was

given the suit land by the church. He added that his late father changed the ownership of the suit land after it was sold to him. He was not aware that the late Bertold the first owner was not involved in the change of ownership of the suit land. He firmed that there was sale and he saw the documents for change of ownership to his late father Joseph. He called one **Marry Joseph Bonga** who testified as **DW2**. She testified that the suit land was of her late father Joseph. From 1980-1990 they were staying at Kisutu. Father Idelphone told her late father that there was a woman who was selling her house because her husband has passed away and she wants to go back to her home. It was year 1992 and his father had no money to buy the suit land. Father Idelphone purchased the suit land for him then his father exchanged the house of Kisutu with Father Idelphone because his house was small and he had a big family. From 1992 they were staying at the suit land without any problem before her parents had passed away. In 2015 SM2 went to rent the suit land then later she was transferred. After the death of her parents its when SM2 went to claim for the suit land. She added that the suit land is theirs and she tendered **exhibit D1** (Certificate of title).

Responding to cross examined question, SM2 told the trial Tribunal that she doesn't know the name of that mother who is now deceased. She added that she doesn't know if there was a sale agreement or not. She said, they changed the names in the electricity and water bill in 1992. She testified further that the wife of the late Bertold was involved in the transfer of ownership but she has not seen the said documents because she was not there.

After a full trial the DLHT decided in favour of the respondent. Discontented by the decision, the appellant filed the instant appeal raising the following grounds:

- 1. That, the District Land and Housing Tribunal erred in law and in fact in applying a principle of adverse possession not withstanding that the same doesn't apply in a registered land.*
- 2. That, the District Land and Housing Tribunal erred in law and in fact in failing to hold that the seller of the House in dispute had no legal capacity to do so since she was not an administratrix of the estates of the late Bertold Amlima.*
- 3. That, the District Land and Housing Tribunal erred in law and in fact in deciding in favour of the respondent whose testimony*

and evidence completely departed from his pleadings.

4. *That, the District Land and Housing Tribunal erred both in law and in fact in deciding in favour of the respondent who failed to prove that the suit land was sold to the respondent's father the late Joseph Bonga.*

The appeal was disposed of by way of written submission. Both parties appeared in person, unrepresented.

Supporting the appeal, the appellant argued the grounds of appeal in seriatim. Starting with the 1st ground of appeal he contended that it is undisputed by the parties that the suit house is surveyed but the trial Tribunal decided the matter in favour of the respondent due to the reason that the respondent has acquired the suit house/land on the basis of adverse possession after he had occupied it for a long time. He argued that the learned Chairman of the Tribunal erred in law to apply the principle of adverse possession on a registered land since the same does not apply.

He fortified his position by citing the provisions of **Section 37 of the Law of Limitation Act, [Cap 89 R.E 2019]**; and the case of **The Hon. Attorney General vs Mwahezi Mohamed and 3 Others, Civil Appeal**

No. 391 of 2019, CAT (unreported) at page 10-11 to support his argument. In that case it was observed that adverse possession on a registered land is not automated by just claiming long occupation of the land, instead a person must comply with the legal procedures as per **Section 37 of the Law of Limitation Act, [Cap 89 R.E 2019]**. He submitted further that in the records of the trial Tribunal the respondent had neither pleaded adverse possession nor proved to have followed the legal procedures entailed under **Section 37 (Supra)**; instead he pleaded to have bought the suit land. Therefore, he observed that it was incorrect for the trial Tribunal to award the respondent on the ground of long occupation which he never pleaded. The trial Tribunal relied on other evidence to determine the issue of ownership of the suit land/house, he argued.

As to the 2nd ground of appeal the appellant contended that it is trite law that estate of a deceased person must be administered by a person dully appointed as an administrator by the court of competent jurisdiction as per **Section 101 of the Probate and Administration of Estate Act, [Cap. 352 R.E 2002]** and item 5 and 6 of **the 5th Schedule of the Magistrates' Court Act, [Cap. 11 R.E 2019]**. He

submitted further that as per the records of the trial Tribunal the previous owner of the suit land was the late Bertold Amlima. Mary Joseph Bonga (DW2) testified that the suit land was disposed by way of sale to the late Joseph Cosmas Bonga and it was after the death of Bertold. She confirmed the seller was not an administratrix of the estates of the late Bertold due to that the seller had no legal capacity to dispose the deceased's land. Therefore, all subsequent transactions of the suit land render them to be a nullity.

With regard to the 3rd ground of appeal the appellant submitted that it is trite law that parties are bound by their pleadings. The facts which have not been pleaded can not form part of the records in the proceedings of the court. He further argued that the respondent in his written statement contended that the late Joseph Bonga was given the suit land by the Roman Catholic Church St. Paul Majengo Parish where he was serving as catechist as per paragraph 2 of the respondent's written statement of defence. Surprisingly during the trial, they testified to have purchased the suit land from father Idelphone. The essence of parties to be bound by their pleadings serves to narrow down the area of dispute and to make parties stick

on the specific facts in issue. He further submitted that the facts not stated in the pleadings are strictly prohibited by law as provided under **Order 6 Rule 7 of the Civil Procedure Code, [Cap. 33 R.E 2002]** (sic). To bolster his argument, he cited the case of **Joseph Marco vs Paschal Rweyemamu** [1977] LRT No. 59, it was observed that; -

"In civil cases it is extremely important for a trial court to leave its findings to the issues as revealed by the state of the pleadings and no party should be allowed to go outside his pleadings. Order 6 Rule 7 is very specific on this point, the purpose of this rule is to prevent parties from introducing new matter without giving adequate time to the opposite party to answer. Pleadings are meant to clarify and identify the areas of dispute between the parties, by this way each side is afforded sufficient opportunity to prepare its case on the point in dispute."

The same position was reiterated in the case of **George Shambwe vs The Attorney General & Another** (1996) TLR 334 CAT that it is not correct in law to imply a fact which is not specifically pleaded.

On the 4th ground of appeal the appellant argued that the burden of proof lies on the party who asserts existence of facts as per **Section 110 (1) (2) and 111 of the Evidence Act, [Cap. 6 R.E 2019]**

(sic). The respondent did not adequately discharge this burden as he completely failed to prove his assertions that the suit land was given to his late father Joseph Cosmas Bonga. He also failed to prove that the suit house was bought by his late father as he neither tendered sale agreement nor transfer deeds documents to prove that the suit land was lawfully disposed by way of sale. He thus, prayed for this court to allow the appeal.

In reply, the respondent generally opposed the appellants' complaints. He prayed for the court to adopt the reply to the petition of appeal sworn by the respondent. Concerning the 1st ground of appeal, he argued that the trial Tribunal correctly considered the certificate of title which has the name of the respondent's late father which was issued in 1997 and it has been 20 years since the certificate was issued. He posed a question as to why did the appellant and his family waited until 2020 to make a claim on the ownership of their father's suit land? He also argued that for 28 years the suit land has been used by the respondent peacefully with no interruption. Such enjoyment is protected by the

statutory period of limitation of 12 years in accordance with **the Law of Limitation Act**, so the appellant's claim is extremely time barred.

As to the 2nd ground of appeal, the respondent submitted that the ground is baseless as the appellant has failed to count the facts since the appellant and his family were not aware of the existence of the suit land. Due to that the seller who is now a deceased lawfully sold the suit land. He also argued that the claim that the suit land was the property of the late appellant's father does not mean that his wife had no capacity to sale. He further argued that the appellant has failed to prove that the suit property was the owned by his late father in exclusion of his wife and that matrimonial property can be disposed of by any of the party thereto.

In opposing the 3rd ground of appeal, the Respondent submitted that the respondents' pleadings did not depart from his pleadings, as Fr. Idelphone was willing to help in exchange for the house of the late Joseph at that time, since then the suit land has been in the care of the respondent's family.

Responding to the 4th ground of appeal, the respondent submitted that it is the principle of the law in civil case that the standard of

proof is on a balance of probabilities. This simply means that the court shall sustain such evidence which is more credible than the other on a particular fact to be proved. He contended that the appellant has failed to meet the requirement of **Section 119 of the Evidence Act, [Cap. 6 R.E 2002]** (sic) that the burden of proving is not on the owner but on the person who asserts that he is not the owner. The respondent therefore, prayed for this court to dismiss the appeal with costs.

In rejoinder, the appellant had nothing to rejoin.

In essence what could be gathered from the arguments and the whole case in general is that the bone of contention is on the legal ownership of the disputed house/land.

On the 1st ground of appeal, the appellant raised the issue of applicability of the doctrine of adverse possession as held by the trial Tribunal.

The principle of adverse possession is occupation of land inconsistent with the title of the true owner. That is, inconsistent with and in denial of the right of the true owner of the premises as it was held in

Registered Trustees of Holly Spirit Sisters Tanzania vs. January Kamili Shayo & Others, Civil Appeal 193 of 2016, CAT-Arusha, (unreported). It is a process recognized by law whereby a non-owner occupant of a piece of land gains title and ownership of that land after occupying it for a particular period of time. In Tanzania, the time limitation of instituting the suit for claims or recovery of land is 12 years as per **Section 3 (1) and Item 22 of Part 1 of the Schedule to the Law of Limitation Act, [Cap. 89 R.E. 2019]**. After the expiry of 12 years of continuous occupation of the land without interruption, the occupier has the right to acquire the title of the respective land upon fulfilment of certain conditions. The principle was stated in the case of **Bhoke Kifang'ita vs. Makuru Mahemba**, Civil Appeal No. 222 of 2017, CAT-Mwanza (unreported), where it was held that: -

"It is a settled principle of law that a person who occupies someone's land without permission and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession."

In private or unregistered land, the applicability of the doctrine of adverse possession is by non-owner occupier of land to use the

abandoned land for not less than 12 years in the knowledge of the owner without interference. In **Registered Trustees of Holly Spirit Sisters Tanzania vs. January Kamili Shayo & Others** (Supra), the Court of Appeal held on page 25 of the judgment that; -

"Thus, 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 the absence of possession by the valid 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 possession throughout the aforesaid statutory period; and

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

The above-cited case provides criteria to be proven by a person seeking to acquire title to land by adverse possession. As the appellant rightly submitted the doctrine of adverse possession does not apply automatically on a registered land. The land must be abandoned by the owner of the right of occupancy. Under **Section 51 of the Land Act, [Cap. 113 R.E. 2019]**, it is the Land Commissioner who may issue a notice of abandonment that the land is abandoned. After the expiry of the notice, the Commissioner shall issue the declaration that the land is abandoned. Then, the Commissioner shall proceed to revoke the right of occupancy. Further, **Section 37 (1) of the Law of Limitation Act, [Cap. 89 R.E 2019]** provides that a person claiming to be entitled to the land by adverse possession held under a right of occupancy may apply to the High Court for an order that he be registered under the relevant law. Thus, for the adverse possession to apply to the registered land, the land

has to be abandoned and the adverse possessor has to apply to the High Court for the order to be registered as the holder of the right of occupancy. In the case at hand, the respondent claimed to have acquired the suit property by adverse possession. However, he has failed to prove if he has complied with the procedures laid down under **Section 37 of the Limitation Act.**

The nature of the suit land is a registered land. It does not allow automatic applicability of the adverse possession principle. The respondent was supposed to seek an order of the High Court for a claim of right under adverse possession. The same was not done. Thus, the trial Tribunal erred to hold that respondent is a rightful owner of the suit land by adverse possession.

Regarding the 2nd ground of appeal, the issue for consideration is whether the seller of the suit land had legal capacity to sale.

The trial Tribunal wrongly proceeded to determine the issue of ownership of the suit house/land despite having found and declared that the seller of the suit land had no locus stand to sale the suit land. It is a cardinal principle of law that an appointed administrator or executor is a qualified person in law to deal with the property of the

deceased. The position was articulated in the case of **Mohamed Hassan vs Mayase Mzee & Mwanahawa Mzee** 1994 TLR 225 CA, where it was observed that: -

"Administrator is the person who has mandate to deal with the deceased's properties"

Otherwise, no other person has a right or is entitled to administer the rights belonging to the deceased after his/her death in respect of the properties. However, as rightly argued by the appellant the trial Tribunal went on determining the ownership by declaring the respondent as a lawful owner of the suit land while knowing the seller was not an administratrix of the estates of the late Bertold. The analysis of Hon. Chairman was inappropriate in the circumstance of this case. Otherwise, it could lead to fundamental irregularities amounting to miscarriage of justice as occasioned in this case. It would have sufficed for Hon. Chairman to dispose of the suit on the ground of locus standi of the seller of the suit land as it has not been proved that she was an administratrix of the deceased's estate.

Before I pen off, I wish to say that the duty of the Court or adjudicators is to make sure that justice is done. Justice cannot be done if no satisfactory records or exhibits are tendered. That the law

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These documents (and any other document relevant and necessary for determination of the issue of ownership) be tendered by the relevant Land Officer based on the records of the Land Office. Each party (beginning with the appellant/original applicant) should be given an opportunity to give additional evidence on the documents and to cross-examine the other or the witnesses producing them thereon. After the admission of the additional evidence, the Tribunal should then determine the issue as to the ownership of the suit property. In doing so however, the Tribunal is directed to consider the following sub-issues, which should assist in determining the main issue: -

- (a) Whether the late Bertold Amlima was the original owner of the disputed house/land;
- (b) If the answer to issue (a) is in the affirmative, whether the sale and transfer was lawfully and effectively done.
- (c) Whether the certificate of title was legally and procedurally acquired obtained.

Given the foregoing, I nullify the proceedings of the trial Tribunal from 31.03.2023 including the judgment and all the resultants orders there

from. I further direct the trial Tribunal to take additional evidence as explained above to determine the issues as directed upon and analyse the evidence already on record. The additional evidence to be taken pursuant to the above directives.

The appeal is thus allowed to the extent stated. The parties shall bear their own respective costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

**R.A Ebrahim
Judge.**

17.11.2023

Mtwara.