

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

**LAND APPEAL NO. 10 OF 2022**

(Arising from the District Land and Housing Tribunal for Mtwara at Mtwara in  
Land Application No. 10/2021 dated 8<sup>th</sup> June 2022)

**HAMISI OMARY HAMISI (Administrator of the estate of the late Omary  
Hamisi Mfenvu) .....APPELLANT**

**VERSUS**

**ABDALLAH MTAMBO ..... RESPONDENT**

**JUDGEMENT**

21.09.2023 & 15.03.2024

**EBRAHIM, J.:**

The herein appellant, HAMISI OMARY HAMISI suing as an Administrator of the estates of the late Omary Hamisi Mfenvu filed an instant appeal challenging the decision of the District Land and Housing Tribunal for Kilwa at Kilwa (the DLHT) made in Application No. 18 of 2021 dated 8<sup>th</sup> June, 2022. The subject matter is the land approximating 60 acres which contains cashew nuts, mango trees

and coconut trees located at Kivinje Singano in Kilwa District within Lindi Region (the suit land).

Before the DLHT, the appellant herein sued the respondent for recovery of the suit land which was owned by his late father Omary Hamisi Mfenvu from 1960 to 1985.

Having heard the evidence from both sides, the DLHT decided in favour of the respondent basing on the doctrine of adverse possession. Aggrieved, the appellant preferred the instant appeal raising two grounds of appeal.

The grounds of appeal are as follows:

1. That the trial Tribunal grossly erred in law and fact by not considering that the respondent are *(sic)* just invitees in such disputed land;
2. That the trial Tribunal grossly erred in law and fact by failing to analyze and weigh the evidence of the appellant.

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

The respondent in this matter did not file his reply to the written submission by the appellant. In the circumstances, I shall proceed to

determine the matter on part of the appellant's submission (exparte).

Submitting jointly in support of the two grounds of appeal, the appellant jointly argued that according to the evidence of PW1, PW2, and PW3 at page 4 of the typed judgement, it was the late Omary Hamisi Mfenvu (the appellant's father) who invited the respondent's father in the suit land. He cited the case of **Magoiga Nyankorongo Mriri vs Chacha Mroso Saire** (Civil Appeal 464 of 2020) [2022] TZCA 343 (14 June 2022) at page 14 where the Court held that;

*"Where a party's claim on land arises after being invited to stay on the suit land on terms prescribed, on the balance of probabilities, such a party is a mere licensee. That possession could never be adverse if it could be referred to as a lawful title."*

At page 12 of the above case, it was further stated that;

*"We wish to underline that an invitee cannot own a land to which he was invited to the exclusion of his host whatever the length of his stay. It does not matter that the said invitee had even made an unexhausted improvement on the land on which he was invited."*

The appellant went on to state that the respondent's late father occupied the disputed farm due to the consent of the owner (the late Omary Hamisi Mfenvu) as he was invited to stay. The fact that he stayed there for more than 12 years does not change his status of a mere invitee. He finally prayed for the appeal to be allowed with costs.

Beginning with the ground of evaluation of evidence of each witness, certainly, I am abreast of the proposition by the Court of Appeal in the cited case of **Stanslaus Rugaba Kasusula and AG vs. Falesi Kabuye** [1982] TLR, 388 that it is the duty of the trial court to evaluate the evidence of each witness as well as their credibility and make a finding on the contested facts in issue. The contested fact in issue in this case is the ownership of the suit land as claimed by the appellant.

I thoroughly perused the judgement of the trial Tribunal. The trial Chairman generally based on the evidence adduced by the respondent and concluded that;

*"Kwakuwa mjibu maombi ndiye mmiliki halali wa eneo la mgogoro tangu 1995, na amelima bila bughudha miaka yote hiyo mpaka mgogoro kuanza 2021 akiwa na zaidi ya miaka*

20 hapo shambani basi eneo ni mali yake." (Page 7 of the impugned judgement).

As it can be observed, this being the first appeal, I am obliged without fail to re-visit and re-evaluate the entire evidence on record and subject the same to objective scrutiny; and if merited arrive at this court's findings of fact.

I am inspired by the position stated in the case of **Shah vs Aguto** (1970) 1 EA 263 citing with authority the case of **Peter vs Sunday Post** (1958) EA 424 where it was held on page 492 that:

*"It is a strong for an appellate Court to differ from the finding on a question of fact of a judge who tried the case and who has had the advantage of seeing and hearing the witness. An appellate court has, indeed jurisdiction to review the evidence **in order to determine whether the conclusion originally reached upon that evidence on records and find out whether the appellant's defence can stand or otherwise.**"*

[Emphasis added].

The appellant (PWI) testified before the trial tribunal that one day Hemedi Mtambo (respondent's father) went to borrow an area for farming while there was a labour force farming order. He was given one acre by his late father. The same fact was also evidenced by

PW4(Hiba Omary Hamisi). He testified further that his father died later followed by the respondent's father. There remained the wife of Mohamedi Mtambo. He asked her about the suit land but she insisted on staying there for some time. Thereafter he asked her about the respondent but she told him that was not coming. Unfortunately, the respondent's mother used the suit land for two years and she died. The appellant made efforts to find the respondent in vain. It is from then that the dispute arose. When PW2 was (Said Omari Hamisi) was responding to cross – examination questions, he said that the disputed land belongs to the late Omary Hamisi Mfenvu (his late father) having been bequeathed by his fore parents.

Going by the testimonies of the defence witnesses, the respondent who testified as DW1, told the trial Tribunal that his late father died in 1995 and his late mother died in 2015. He started to own the suit land after the death of his late father in 1995. However he did not tell the trial Tribunal how he acquired the suit land. When he was cross-examined by the assessor, he responded that his late father

acquired the disputed land through labour force farming history (page 10 of the typed proceedings).

In determining this appeal, I shall be guided by the principle of the law in civil cases that *"he who alleges must prove; and that a burden of proof lies on a person who would fail if no evidence were given at all on the other side"* - **Section 110 (1) and 111 of the Law of Evidence Act [Cap. 6 R.E 2022]**. It is equally the principle of the law in civil cases 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. **aws of Evidence, 18<sup>th</sup> Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar,** published by Lexis Nexis as below:

*"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he*

*arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...."*

(At page 1896) [Emphasis added].

Further again, **Section 112 of the Evidence Act [Cap 6 R.E 2022]** provides that where a person claims the existence of a particular fact, the proof of such fact lies on that person. Basing on the above stances of the law about the matter at issue the appellant had a duty to prove his claim that he is the owner of the suit land.

The appellant brought evidence to prove his claim that his late father Omary Hamisi Mfenvu was the owner of the suit land and how he acquired it by calling witnesses i.e, PW2, PW3 and PW4. Conversely, the respondent could neither call any member of the family to confirm that was bequeathed the suit land in the year 1995 nor tender any documentary proof to that effect.

The trial Tribunal contended that the respondent is a lawful owner of the suit land due to the reasons that the respondent has been using the suit land for 20 years without any interruption.

I do not agree with such findings of the trial Tribunal of giving weight to the more testimony of the respondent without further proof. More so, the respondent admitted that his late father acquired the suit



land during the history of labour force farming which qualifies the evidence of PW1 that the Respondent's father was borrowed 1 acre during labour force farming.

In the case of **Musa Hassani vs Barnabas Yohanna Shedafa** (Civil Appeal 101 of 2018) [2020] TZCA 34 (27 February 2020) it was observed that;

*"We wish to underline that an invitee cannot own a land to which he was invited to the exclusion of his host whatever the length of his stay. It does not matter that the said invitee had even made unexhausted improvements on the land on which he was invited."*

Thus, the respondent being a mere invitee and cannot acquire title by adverse possession irrespective of the developments he has made.

That being said I find this appeal to be meritorious and I allow it. The appellant's evidence on the proof of ownership of one acre was heavier than that of the respondent. The appellant to have his costs.

Ordered accordingly.



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

**R.A Ebrahim**  
**Judge.**

**15.03.2024**

**Mtwara.**