IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 15 OF 2023

(Arising from Land Application No. 61 of 2022 at the DLHT for Mtwara at Mtwara)

HAWA RASHIDI ATHUMANI ---------- 1ST APPELLANT

LUKIA RASHIDI ATHUMANI ---------- 2ND APPELLANT

VERSUS

HASSAN SALUM ATHUMAN ---------- RESPONDENT

Date of last Order: 05.10.2023
Date of Judgment: 22.03.2024

JUDGEMENT

Ebrahim, J.:

The herein Appellants filed the instant appeal challenging the decision of the District Land and Housing Tribunal for Mtwara at Mtwara (the DLHT) made in Land Application No. 61 of 2022 dated 17th March, 2023.

Brief facts of the case as gathered from the record are that: Before the District Land and Housing Tribunal for Mtwara at Mtwara the

Appellant sued the Respondent for unlawfully invading the suit land which they were given by their late father in 1986's. The subject matter is the unsurveyed land which is approximately 2 acres located at Mkola village, Luagala, Tandahimba District within Mtwara Region (to be referred to as the suit land).

It was alleged that the Appellants have been using the suit land up to 1990s when they were married and went away from the village and left the suit land in their late father's care. When they returned they found the Respondent using the suit land. They asked their late father who told them that the Respondent had asked to use the suit land for cultivating temporary crops. The Respondent has been taking care of the suit land untill 2019 when the Appellants' father passed away. They claimed back the suit land from the Respondent but he refused. He claimed that he bought the suit land with five cashew nuts trees in 1993 from the Appellants' late father.

Responding to the application, in his written statement of defence, save for the contents about the address, the Respondent denied every allegation and put the Appellants to strict proof thereof.

Having heard the evidence from both sides, the trial Tribunal decided in favour of the respondent.

Discontented by the decision, the Appellants filed the instant appeal raising the following grounds;

1. *That, the Chairman of Tribunal erred both in law and facts for not considering that there is no any documentary evidence of sale agreement of the said five trees of cashew nuts which was entered between the Respondent and Appellants father.*
2. *That, the Chairman of trial Tribunal erred both in law and fact for ignoring that, the said land in dispute started at Village Land Committee and Ward Tribunal of Luagala, where by the Respondent declared to have purchased the disputed land failure on it to surrender such Land farm to the Respondent's family. The photocopy of related document is attached herewith.*
3. *That, the Chairman of trial Tribunal erred both in law and fact for consider, the Respondent use the land farm in dispute for long time (years), while that is not a genuine point in this situation, since all disputed parties are blood closely relatives and he was given only temporally consent to use the disputed Land Farm.*
4. *That, the Chairman of the Trial Tribunal erred both in law and fact to consider the evidence given by the Respondent's witness, while the proper witness of this dispute was oldest member of ward Tribunal Luagala and village counsel of the related place.*

5. *That, the Chairman of the trial Tribunal erred in law and fact for fail to ignore this land suits to be heared at the Ward Tribunal of Luagala and fainally direct / advice the Appellant's to file this matter for district Tribunal for negative interest for the Appellant's side.*
6. *That, the trial Chairman erred both in law and fact for determine the case with bias for deciding the case with poor evidence.*
7. *That, the trial Chairman erred both in law and fact for not consider, there is an issue of Probate after death Appeallant's father, there is no administrator of Estate who has legal capacity.*

In this appeal, both parties appeared in person, unrepresented. The appeal was heard by way of written submissions.

Supporting the appeal, the Appellants argued the grounds of appeal in seriatim. Starting with the 1st ground of appeal they said it is undisputed that there is no document to prove the sale of the cashew nuts trees (suit land) between their late father and the Respondent. Therefore, they are still the owner of the suit land.

Submitting on the 2nd and 3rd ground of appeal together they contended that they entered into an agreement at the Village Council and Ward Office where the Respondent agreed to purchase the suit land for TZS. 350,000/= of which he failed to pay for it.

Arguing the 4th ground of appeal, the Appellants submitted that the Tribunal did not consider the outcome from the Village Council and Ward Office; and as for the 5th ground of appeal, they contended that it is closely related to the 4th ground of appeal.

Submitting on the 6th ground of appeal, the Appellants said that the Tribunal determined the suit unfairly and that they inherited the suit land from their late father.

Responding, the Respondent submitted on the 1st and 2nd grounds of appeal that he had owned the suit land since 1993 after buying it from the late Rashid Athumani (Appellants' father). He said he was also given another piece of land out of natural love and affection by one Mkanakuta Abdallah. He stated further that he has been using the suit land for a long time without any disturbance from any person. The Respondent cited the case of **Abdallah Mfandi vs. Ramadhani Ikungu and Seif Muhoni,** Land Appeal No. 7 of 2009 HC at Dodoma (Unreported).

Arguing the 3rd and 4th grounds of appeal, the Respondent pointed out the legal issue that the Appellants had no locus to sue him due to the reason that he is the rightful owner of the suit land after buying it

and he was given as a gift. He prayed for the appeal to be dismissed with costs.

The Respondent did not argue on the 5th, 6th, and 7th ground of appeal.

After going through the rival submissions between the parties, it is obvious that this appeal is hinged on the complaint by the Appellant that the trial Tribunal did not properly evaluate and consider the evidence of each witness; hence coming to an erroneous decision even though the Appellants evidence was heavier than that of the Respondent.

Moreover, before I proceed to address the facts in issue, I find it apt to determine the point of law as raised by the Respondent that the Appellants had no locus standi to sue. His argument comes from the fact that he bought the suit land from their late father. Without wasting much time, the point of law raised by the Respondent has no bearing because at no point did the Appellants claim to be standing on behalf of their late father. What they testified is that they were bequeathed the suit land by their late father before his death. Therefore, the raised point of law is irrelevant.

Now coming to the issue of evaluation of evidence;

Verily, it is a jurisprudential position of the law that a trial court or tribunal is duty-bound to evaluate the evidence of each witness and their credibility and make a finding on the contested facts in issue. This position has been well articulated in the case of **Martha Wejja vs Attorney General and Another** [1982] TLR 35; and the case of **Stanslaus Rugaba Kasusula and Attorney General vs Falesi Kabuye** [1982] TLR 388.

I am abreast of the cardinal principle of the law that being the first appeal, this court is obliged without fail to re-appraise the entire evidence on record, subject it to critical analysis, and arrive at its findings of fact if need be. This position has been extensively discussed by the Court of Appeal in the case of The **Registered Trustee of Joy in the Harvest vs Hamza K. Sungura,** Civil Appeal No. 149 of 2017.

The 1st Appellant testified at the trial as PW1. According to her testimony, she said she was bequeathed the suit land inter-vivos by her late father. She used it for three years i.e. 1986, 1987 and 1988 before she got married. When she came back, she found the Respondent using the suit land. Her late father told her that he asked

the Respondent to plant temporary crops like "njugu", "kunde" and maize. She told her late father to tell the Respondent to stop cultivating the farm (suit land) because she wanted it back. When the Respondent was told to stop, it was when the dispute arose. Their late father had a stroke for a long time and died in 2019. On 16.04.2020 they had a meeting which was convened by the Respondent. He agreed to return the suit land or buy it. He promised to return it on 20.07.2020.

The 2nd Appellant testimony was similar to PW2. She told the trial Tribunal that she was claiming the suit land which was invaded by the Respondent. She was also bequeathed the suit land inter-vivos by her late father. She used the suit land for three-year i.e. 1986, 1987, and 1988 then she went to get married.

On claiming back her land, she encountered no good answers from the Respondent and it was when the dispute started. After the death of their late father, on 16.04.2020 the Respondent convened a meeting to end the dispute. He promised to surrender the suit land on 20.07.2020 but he did not do so. He also proposed to buy it but he neither surrendered nor purchased the suit land.

PW3, who is the relative of the parties testified that the late Appellants' father was sick for a long time. Later the Appellants reminded the Respondent about the farm (suit land) which he was licensed to use by their late father. PW3 was not sure if the Respondent was given the suit land or purchased it. However, the agreement was to plant temporary crops and not permanent crops. After the funeral on 15.04.2020, the Respondent convened a meeting in which he promised to end the dispute in July.

Responding to cross examination question, PW3 told the trial Tribunal that he went back to the village in 1996 and found the 1st Appellant was married at Mkola. At that time the Respondent was the one using the suit land.

PW4, who is a brother of the Respondent testified that his brother (the Respondent) went to his late uncle to license a piece of land for cultivation. His late uncle gave him 2 acres because the Appellants (sisters) were married, and when they return, they would take back their farm (suit land). His sisters (the Appellants) went back to nurse their late father. On 16.04.2020 they had a family meeting at the Respondent's place. The meeting was about handing over the suit

land to the Appellants. The Respondent promised to hand it back in July 2020, but he did not do that.

PW5, told the trial Tribunal that on 16.04.2020 after the funeral of their late father, he was called to a family meeting where he heard the Respondent saying that he called them because there was a land dispute between him and the Appellants. The Respondent alleged that he asked his uncle (the late father of the Appellants) to use the suit land for a short period. In that meeting, he said he wanted to surrender it back to the Appellants in July after harvesting "ufuta".

Responding to cross examination question, PW5 told the trial Tribunal that the Respondent convened the meeting for mediation and to surrender the suit land to the Appellants. Further to that, he said his farm and that of the Respondent are in the same line.

Conversely, the Respondent who testified as **DW1** told the trial Tribunal that in 1993 while cultivating the farm he went across the cashew nut trees of Mzee Rashid Athumani (the late father of the Appellants). Due to that, he was told to pay for the five cashew nuts trees TZS. 5,000/=.

Responding to cross examination question DW1 told the trial Tribunal that the suit land was customarily sold to him; hence, there is no

document. Further to that when he was cross-examined by the assessor, he said what he knows is that the Appellants were claiming for ¼ acres which has five cashew nuts trees.

DW2, testified before the trial tribunal that he gave the Respondent Mahame (sic). The boundaries are near the Appellants' late father's farm. That the Appellants' late father gave the Respondent five cashew nut trees but he did not know whether the said five cashew nut trees were sold to the Respondent or given to him.

Responding to cross cross-examination question, DW2 told the trial Tribunal that at the time when the Respondent was licensed to cultivate the suit land by the Appellants' late father, no one knew about it.

After revising the evidence of both parties and their witnesses, this court first observed that the Appellants testified during the trial that the disputed land belonged to them after being given by their late father before his death. When they were married, they left the suit land in the hands of their late father. It was when their late father licensed the Respondent to use the suit land.

After the return of the Appellants before the death of their father, they demanded back the suit land but the Respondent refused. It was evidenced by PW1, PW2 (the Appellants); PW3, the uncle of the parties, and PW4 brother of the Respondent that on 16.04.2020 the Respondent convened a meeting after the funeral of the Appellants' late father to settle the issue of the suit land. His intention was either to surrender it back to the Appellants or to purchase it after the harvest of "ufuta".

Although the Respondent contended to have purchased the suit land in 1993, he had no evidence to prove such transaction because the father of the Appellants died in 2019.

More so, the Respondent is the one who convened a family meeting to discuss the suit land. The family wanted the Respondent to vacate the suit land because he was a mere licensee. As for the testimony of DW2, he testified that he did not know whether the Respondent was licensed or given the suit land (five cashew nut trees). At the same time, DW2 said at the time when the Respondent was licensed to use the suit land by the Appellants' late father, no one knew about it.

To the contrary, PW3, PW4, and PW5, the family members of both parties supported the Appellants' argument that they had been given the suit land by their late father and the Respondent was just a licensee.

Gathered from the evidence on record, the suit land is not surveyed. Thus, strong evidence to prove ownership/occupation is required from either side. The Respondent said to have purchased the suit land since 1993 but there is no cogent evidence to prove such fact; DW2's evidence could not prove such fact either.

Actually, they are contradicting each other. The evidence that the Appellants are the owners of the suit land is strongly supported by PW3, PW4, and PW5.

I am abreast of the position of the law that a mere licensee or an invitee cannot claim adverse possession. However, the same is subject to proof by the so-called owner of the suit land that indeed the invader was merely licensed to use the land. In this case there is overwhelming evidence that the Respondent has been using the land under license and he was aware that the Appellants are the owners

of the suit land which is why he convened a family meeting to settle the matter.

It thus proves their ownership contrary to the contradictory averments of the Respondent. As alluded earlier, the law requires that *"he who alleges a particular fact must prove the existence of such fact"*. To the contrary the Respondent failed to prove that he purchased the suit land.

The foregoing circumstances therefore, goes to dispose of the grounds of appeal that have been raised by the Appellants that the DLHT did not properly evaluate evidence adduced by the parties. Owing to the above findings; I allow the appeal with costs. The judgement of the DLHT is hereby quashed, the orders made therein are set aside.

Ordered accordingly.

THE HIGH COURT OF TANZANIA

R.A Ebrahim

Judge.

22.03.2024
Mtwara.