IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 17 OF 2021

(Originated from Application No. 17 of 2017 in the District Land and Housing Tribunal for Rukwa at Sumbawanga)

KENETH MLIMBA..APPELLANT

VERSUS

1. **REVOCATUS NKANA**
2. **GALUS MWANAUCHI** ....**RESPONDENTS**
3. **CHRISPIN FULILA**

JUDGMENT

12th March & 30th April, 2024

MRISHA, J.

In the District Land and Housing Tribunal for Rukwa at Sumbawanga henceforth the trial tribunal, the appellant namely **Keneth Mlimba** stood as the applicant whilst **Revocatus Nkana, Galus Mwanauchi** and **Chrispin Fulila** appeared as the first, second and third respondents the same status they currently have before this court.

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The appellant's case was that the respondents had maliciously invaded into his 47 acres piece of land (the disputed land) which is located at Malongwe Village within Nkasi District of Rukwa Region its value being Tshs. 5,000,000/=. He further alleged to have purchased the said piece of land on 05.09.2014 from one **Samwel Zenobi** and reduced the sale agreement into writing.

The records of the trial tribunal reveal that such sale agreement was tendered before the trial tribunal and admitted as **Exhibit P1** despite a number of objections from the respondents. It was thus, the appellant's prayer before the trial tribunal that the respondents be ordered to vacate from the disputed land and costs to follow the event.

Conversely, the respondents strongly disputed the appellant's claim arguing that the disputed land belongs to them as they purchased it from one Conrad January Machimu (the appellant/applicant's third witness) in 1994 by paying him Tshs. 1,005,000/= as consideration. They added that the size of the disputed land is 67 acres and for each acre, they paid Tshs. 15,000/=.

After a full trial the trial tribunal found that the appellant/applicant failed to prove his claim of the disputed land on the balance of probabilities. Hence, dismissed his claim and declared the respondents as the lawful

owners of the disputed land. Among the reasons which influenced the said tribunal to proceed that way, was that first, the respondents were the first to purchase the disputed land from Conrad Machimu (the appellant/applicant's third witness @SM3) in 1999 as opposed to the appellant whose evidence showed that he purchased the suit land from one Samwel Zenobi in 2014.

Secondly, Exhibit P1 which is a sale agreement is confusing because despite its heading to describe is as a sale agreement, its contents show that it was an affidavit. Thirdly, the trial tribunal found that the respondents had been in occupation of the disputed land for almost 23 (twenty-three) years undisturbed that is from 1994 to 2017 when the land dispute between them and the appellant ensued.

Fourthly, the appellant failed to call one Samwel Zenobi whom he claimed to have purchased the disputed land from in order to bear him out that he is the one who sold the same to him. Fifthly, the trial tribunal found that the appellant's assertion that SM3 was just borrowed the disputed land by Zenobi Sukari (the appellant/applicant's second witness @SM2), but after sometime the former returned the same to SM2, is baseless because there was no evidence to show if SM2 had taken any legal measures against the first, second and third respondents for allegedly invading into his land.

However, the appellant was aggrieved by the above decision. He has thus, approached the court with a three-ground memorandum of appeal. Hence, I take pain to reproduce them as hereunder:

1. *That the trial tribunal erred in law and fact in evaluating the evidence on the principle of adverse possession.*
2. *That the trial tribunal erred in law and fact in holding that the sale agreement between the respondents and Conrad Machimu (SM3) was valid while the said Conrad Machimu admitted that he had not sale the disputed land since he was only a caretaker of the disputed land.*
3. *That the trial 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 wrong decision.*

It is therefore, his prayer that with the above grounds of grievances, the court be pleased to quash and set aside the judgment of the trial tribunal, declare the appellant as the lawful owner of the disputed land and that the respondents be ordered to pay costs.

On the other side, the respondents through their reply to the above memorandum of appeal, have strongly disputed all the appellant's grounds of appeal.

At the hearing stage, the appellant enjoyed the legal service of Ms. Veronica Mwanicheta, learned advocate whereas the respondents appeared personally without any legal representation. Submitting in respect of the first ground of appeal, Ms. Veronica Mwanicheta argued that it was not proper for the learned trial tribunal's chairperson to evaluate evidence based on the principle of adverse possession while the respondents claimed through their evidence to have purchased the disputed land from one Conrad Machimbu (SM3).

She further submitted that the respondents failed to prove conditions which are required in order to prove ownership of land through adverse possession. Hence, it was erroneous for the learned trial chairperson to hold that they also acquired the disputed land through adverse possession.

To support her propositions, the learned counsel relied on the cases of **Jumanne Chimpaye vs Daud Mohamed Nkwaje**, Misc. Land Appeal No. 06 of 2020 and **Evarist Kanoni vs Audifasi Chenga,** Misc. Land Appeal No. 13 of 2020 (all unreported).

In regard to the second ground, it was the appellant's counsel submission that according to the typed records of the trial tribunal especially at pages 15 to 16, it is revealed therein that the disputed

land belonged to SM2 (the appellant's second witness) because it was returned to him by SM3 who was just borrowed the same by SM2; hence in the circumstance, SM3 had no mandate to sell the disputed land to the respondents.

To bolster the above argument, the appellant's counsel relied on the principle that **Nemo dat quod non habet** which literally means, *"no one can give what they do not have".* She further argued that even if it could be shown that SM3 sold the disputed land to the respondents, still such sale could not be lawful under the eyes of the law because SM3 was not the lawful owner of the disputed land.

Another reason which according to the appellant's counsel justifies that SM3 was not the lawful owner of the disputed land, is that in the course of his testimony before the trial tribunal, the said witness denied to have sold the disputed land to the respondents as the same was not belonging to him, but to SM2. The learned counsel relied on the cases of **Samweli Lewis Kwabu vs Seleman Bakari Chunganguo & Others**, Land Case No. 156 of 2012 and **Ombeni Kimaro vs Joseph Mishili t/a Catholic Charismatic Renewal**, Civil Appeal No. 2017 (all unreported) to cement her stance.

As for the third ground of appeal, it was the submission of the appellant's counsel that the appellant's evidence, that of his three witnesses who testified as SM2, SM3 and SM4 together with Exhibit P1 which is the sale agreement, proves that the disputed land belongs to the appellant as the same shows that he purchased it from one Samwel Sukari in 2014 after the same had been returned to that person by SM3.

Ms. Veronica Mwanicheta further argued that based on the above evidence, the trial tribunal was supposed to declare the appellant as the lawful owner of the disputed land, as it was stated in the case of **Ombeni Kimaro** (supra).

She also submitted that the evidence adduced by the respondents was not credible for it is contradictory as far as the sale of the disputed land is concerned. For instance, submitted that the first respondent testified that when they purchased the disputed land, the witnesses were Moses Machimu, Lenhard Nyami and Salvatory Mwanamula whereas in the course of his testimony the second respondent said the witness to that sale agreement was Modest January Machimu whilst in his testimony the third respondent said that the persons who witnessed the said sale agreement were Lenhard Nyami, Modest Machimu and Salvatory Mwanamula.

The appellant's counsel submitted further that the respondents' witness one Salvatory Mwanamula who testified before the trial tribunal as DW5, said that he was not present when the said sale agreement was concluded. Hence, due to the above variation of evidence on the part of the respondents, the learned counsel maintained that the respondents' evidence was not credible and reliable. She referred the court to the case of **Emanuel Abraham Nanyaro vs Peniel Ole Saitabau**, 1987 TLR 47 to bolster such proposition.

Stressing on the third ground, Ms. Veronica Mwanicheta submitted that the respondents attached a sale agreement with their written statement of defence, but failed to tender it as an exhibit during defence hearing which omission made their evidence to be inadmissible as per section 61 of the Evidence Act and as it was emphasized in the case of **Daniel Apael Urio vs Exim (T) Bank**, Civil Appeal No. 185 of 2019 to the effect that:

> *"...oral evidence cannot be used to prove the contents of a document. In that regard, we would have expected prima facie, to find some documentary evidence to establish that, there was indeed an agreement entered between the two."*

In conclusion, the learned counsel submitted that indeed, the evidence led by the appellant was stronger than that of the respondents and the learned trial chairperson should have declared the appellant as the owner of the disputed land. In that regard, the counsel relied on the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 and prayed that her client's appeal be allowed and the appellant be declared the lawful owner of the disputed land.

To the first respondent, his submission was that the disputed land belongs to him as he purchased it from SM3 in 1994 and had been in undisturbed occupation of it since then up to 2017 when the appellant emerged claiming that he and his fellow respondents had trespassed into that land. He also submitted that even the person whom the appellant claimed to have purchased the disputed land from, did not testify before the trial tribunal.

The similar versions were made by the second and third respondents who like the first one, repeated what they testified before the trial tribunal and maintained that they purchased the disputed land from SM3. Hence, it was their arguments that the disputed land belongs to them. To put it shortly, what was done by the respondents was not to address and argue on the presented grounds of appeal (perhaps because of being laymen in the legal arena), but to repeat what they

testified before the trial tribunal in order to back up their stances that the disputed land is theirs.

In rejoinder, Ms. Veronica Mwanicheta briefly reiterated her previous submission in chief and prayed to the court to allow the appellant's appeal, quash and set aside the impugned judgment of the lower court and declare the appellant the lawful owner of the disputed land.

Flowing from the above rival submissions, it appears that what the parties are fighting for, is the piece of land which is located at Malongwe Village within Nkasi District of Rukwa Region its value being Tshs. 5,000,000/=. A careful glimpse of the typed records and judgment of the trial tribunal tells that the land dispute between the two emerged in the year 2017 when the appellant began to claim that the disputed land belongs to him as he had purchased it from one Samwel Zenobi who did not testify before the trial tribunal despite there being evidence that he was within reach.

From the above understanding, the issue for determination is whether the present appeal has merits. I will start with the first ground as raised by the appellant. It goes that the trial tribunal erred in law and fact in evaluating the evidence on the principle of adverse possession. In their testimonies before the trial tribunal, the respondents claimed to have

purchased the disputed land from one Conrad Machimu (SM3) at a consideration of Tshs. 1,005,000/= as it appears at pages 21 to page 24 of the said trial tribunal's typed records.

In the circumstances, it does not need a folk lift to ascertain the mode of acquisition of land used by the respondents. If that was the case, then it was incumbent upon the learned chairperson of the trial tribunal to confine herself on what the respondents had pleaded in their pleading as far as the disputed land is concerned.

That is a legal requirement for any court of law when dealing with cases of civil nature like one which is the subject of the instant appeal. Its foundation is based on the principle that the court itself is as bound by the pleadings of the parties as they are themselves; See **Maria Aman Kavishe vs Norah Waziri Mzeru (Administratix of the Estate of the late Silvanus Mzeru & Another**, Civil Appeal No. 365 of 2019 (CAT at Dar es Salaam, unreported).

Reverting back to the present appeal, it is on record that among the reasons used by the learned trial chairperson to hold that the disputed land belongs to the respondents, is that they have been in long occupation of the disputed land for about twenty-three (23) years without any disturbance. Hence, it was her view that in the

circumstance, the respondents became the lawful owners of the disputed land under the principle of adverse possession.

Nevertheless, it is the appellant's counsel that the learned trial chairperson of the trial tribunal erred in law and fact to have evaluated the parties' evidence based on the principle of adverse possession because the mode of acquisition of the disputed land by the respondent, was through sale agreement; hence it was wrong to address the issue of adverse possession.

On my part, I am in agreement with the learned counsel's argument. I say so because as I have alluded earlier, the trial tribunal was duty bound to confine itself on the parties' pleadings as they had been presented before it; by introducing the issue of adverse possession which was never pleaded by the respondents, the learned trial chairperson fell beyond the confines of the law.

My second reason, is that the principle of adverse possession could come into play had there been no evidence to show that the respondents acquired the disputed land through purchasing it from SM3. That is also fortified in the oral submissions of the respondents which show plainly that the three maintained in their respective submissions, that the disputed land belongs to them because they'd purchased it from

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SM3. None of them claimed to have acquired it under the principle of adverse possession and this too, is why I find merits on the first ground of appeal, as raised in the appellant's petition of appeal.

Next is the second ground of appeal in which the appellant has faulted the trial tribunal for holding that the sale agreement between the respondents and Conrad Machimu (SM3) was valid while the latter disputed to have sold the disputed land to the respondents. This ground cannot detain me much because first, it is true that SM3 denied to have sold the dispute land to the respondents. This is evidenced at page 16 of the trial tribunal typed records whereby upon being examined in chief, the said witness said that:

> *"I know one Keneth Mlimba. Zenobi Sukari borrowed the suit land to me. In 2012 he returned and I handed the suit land to him. Later on, Zenobi gave the suit land to his son Samwel Sukari. Samwel Sukari later on sold the suit land to the Applicant. Zenobi Sukari gave me the suit land in 1985 until in 2012 when I returned it to him.*
>
> *The lawful owner of the suit land is the applicant (appellant).* ***I have never sold the suit land to the respondents...****The*

respondents are not the owners of the suit land" [Emphasis is mine]

Apart from the above excerpt, it is also on record that even after being cross examined by the first respondent, SM3 maintained his stance by responding as follows: -

"I did not sell the suit land"

What we may gather from the above excerptions, is that SM3 was not the lawful owner of the disputed land, but a caretaker of it as rightly argued by the appellant's counsel. Also, his testimony depicts that he returned the disputed land to its true owner one Zenobi Sukari who thereafter gave it to Samwel Sukari, his son and the latter sold it to the appellant.

Not only that, but also the evidence of such witness indicates that he denied to have sold the disputed land to any of the respondents; hence, one would have expected the respondents to come up with strong evidence to dispute such witness's assertion.

Again, I have revisited the evidence of the first, second and third respondents at pages 21 to 24 only to find out whether they utilized their right of being heard to deny the above strong evidence from SM3, but I have noticed that none of them disputed such evidence. This

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entails that they agreed with the said witness that he never sold the disputed land to them. In the circumstances, it cannot rightly be said that SM3 sold the disputed land to the respondents who even failed to tender the sale agreement before the trial tribunal and pray that the same be admitted as exhibit in order to prove that they entered into a sale agreement with SM3.

In the third and last ground of appeal it has been alleged that the trial tribunal erred in law and fact in evaluating the evidence on ownership of the disputed land hence reached to a wrong decision. In other words, I have understood the appellant to mean that the learned trial chairperson failed to properly evaluate the evidence of both parties in relation to the ownership of the disputed land hence arrived at a wrong decision.

Principally, it is a trite law that the trial court or any decision making both is duty bound to evaluate the evidence of both parties, subject it to scrutiny and come up with its own findings; see **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (CAT at Mwanza, unreported).

Likewise, it is a trite law that the appellate court can only intervene and re-evaluate the evidence of the lower court where it is evident that there were mis-directions or non-directions on the lower court findings. This

principle was restated in the case of **Mustafa Darajani vs The Republic**, Criminal Appeal No. 277 of 2008 (CAT at Iringa, unreported) which principle of law I find to be applicable given the circumstances of the present case, though it emanates from a criminal case.

I say so because the appellant's complaint on the third ground is that the trial tribunal failed to properly evaluate the evidence adduced by parties before it regarding the ownership of the disputed land hence reached to a wrong decision. Hence, I will be guided by the above principle.

In her submission regarding the third ground of appeal, Ms. Veronica Mwanicheta pinpointed a number of issues which according to her indicate that the trial tribunal failed to properly evaluate the parties' evidence. For instance she said the trial tribunal failed to consider that there was variation of evidence on the part of the respondents in relation to those who witnessed the sale agreement.

Also, it was her submission that despite attaching the alleged sale agreement with their written statement of defence, the respondents failed to tender it before the trial tribunal when the matter was called on for hearing thus making their evidence to be unreliable. She vehemently submitted that considering the totality of the parties' evidence, it was

the appellant's evidence which was stronger than that of the respondents. Hence, it was her view that the appellant ought to have been declared the lawful owner of the disputed land.

To their side, the respondents upon given a floor, maintained that they are the lawful owners of the disputed land because they purchased it from one Conrad Machimu (SM3). However, it is unfortunate that such assertion by the respondents has not been corroborated by the evidence of SM3 whom it is on records that he denied to have sold the disputed land to the respondents.

In my view, had the learned trial chairperson properly directed her mind on such visible evidence, she would have found otherwise. Again, the law is very clear that oral evidence cannot be used to prove the contents of a document, as it was stated in the case of **Daniel Apael Urio** (supra). Thus, based on that principle it is my settled opinion that since the respondents pleaded to have acquired the disputed land by way of purchasing, the only evidence to support their claim in that regard could be the sale agreement.

The records of the trial tribunal are silent as to whether during cross examination any of the said respondents used the alleged sale agreement to test the credibility of SM3/PW3. Nor do those records

reveal that the respondents or any of them urged the trial tribunal to receive and admit such sale agreement as exhibits in order to form part of their evidence.

On the contrary, it is on record that the appellant tendered the sale agreement between him and one Samwel Sukari and the same was admitted by the trial tribunal as Exhibit P1. The contents of such exhibit bear out the appellant on his evidence that the disputed land belongs to him because he purchased it from Samwel Sukari on 05.09.2024. That evidence is also corroborated by the oral evidence of the appellant who testified before the trial tribunal as SM1 and the rest of the appellant's witnesses who testified thereat as PW2, PW3 and PW4.

Up to this juncture, it is obvious that even when weighing the evidence of both parties just as the law of evidence requires, it is the evidence of the appellant which is heavier than and outweighs that of the respondents. Hence, it is my considered view that the appellant managed to prove his case against the respondents on the balance of probabilities as required of him under the provisions of section 110 (1) of the Evidence Act. Hence, I go along with the submission of the counsel for the appellant that the findings of the trial tribunal were wrong due to its failure to properly evaluate the evidence of both parties. Thus, I also find merit on the third ground of appeal.

It follows, therefore, that owing to the foregoing reasons, the present appeal is found to be meritorious. It is thus allowed with costs. Consequently, both the judgment as well as the decree of the trial tribunal, are quashed and set aside and the appellant is declared the lawful owner of the disputed land. The respondents should vacate from the disputed land forthwith.

It is so ordered.

A.A. MRISHA
JUDGE
30.04.2024

DATED at **SUMBAWANGA** this 30th day of April, 2024

A.A. MRISHA
JUDGE
30.04.2024

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