THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

LAND APPEAL NO. 86 OF 2023

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Lnd Application No. 26 of 2023)

QUEEN MWAKISALE.....APPELLANT

VERSUS

WILE LYANYAGILE.....RESPONDENT

JUDGMENT

Date of Last Order: 13/02/2024
Date of Judgment: 23/05/2024

NDUNGURU, J.

Before the District Land and Housing Tribunal for Mbeya at Mbeya in land application No. 26 of 2023 the appellant Queen Mwakisale instituted a suit against the respondent Wile Lyanyagile claiming that has invaded her landed property a farm of 21 acres located at Vitumbi village Lupatingatinga ward in Chunya District Mbeya Region (the suit land).

The appellant alleged in her application and evidence adduced before the trial tribunal that she acquired the suit land by being given by her later father (whom she did not mention his name) in 1990 before his death. That she used the suit land by cultivating it until the year 2003 when she left it under care of one Jumanne Mulungu. That when returned at the place where the land is located in 2019, she was surprised finding the respondent invaded the same claiming to have purchased it from a person by name of Jail Asangalwisya Mwasile.

On his part, the respondent resisted the appellants claim of owning the suit land. He said that, he purchased the suit land from one Jail Mwansile on 18/02/2005 until the year 2023 when the dispute between him and the appellant arose. He contended also that, he has used the suit land for a long time without any complaint from the appellant who was present.

Upon analysing the evidence of both sides, the trial tribunal came to the decision that the appellant did not manage to prove her claim. It thus dismissed the suit.

Discontented, the appellant approached this court with the instant appeal. Previously in the memorandum of appeal she raised five grounds

of appeal which two of them were abandoned at the hearing. Hence, remained with three grounds as follows:

1. That the trial Chairman misdirected himself when applied the principle of adverse possession.
2. That the trail chairman misconstrued the evidence adduced in court during trial
3. That the trail chairman erred in law and fact by failure to give parties opportunity to join necessary parties (seller of the land).

The appeal was argued by way of written submissions. The appellant was represented by Ms. Tumaini Amenye learned advocate while the respondent appeared in person without legal representation.

Arguing for the appeal Ms. Amenye on the 1st ground of appeal that the trail tribunal strayed in applying the principle of adverse possession. That since the respondent claimed to have purchased the suit land it was improper to apply the principle in his favour. Also, that adverse possession principle cannot apply if a person asserting the principle claim the possession by permission of the owner or pursuance of an agreement for sale or lease or otherwise. She referred this court to the case of **Moses v. Lovegrove** [1952]2 QB 533, **Hughes v. Griffin** [1969]1 All ER 460 and the case of **Registered Trustees of Holy**

Spirit Sositer Tanzania v. January Kamil Shayo and 136 others, Civil Appeal No. 193 of 2016 CAT at Arusha. She added that the principle of adverse possession cannot apply over the suit land since the appellant had never abandoned it, rather, she left it under the caretaker of Jumanne Mulungala and she became aware of the invasion in 2019.

As to the 2nd ground Ms. Amenye submitted that the trial tribunal misconstrued the evidence adduced by the parties by adding his own words on the judgment which were not testified by the parties. She referred at pages 3 and 4 of the judgment and those words were quoted as:

"...shahidi huyo aliongeza kuwa kabla ya kuandikisha mauziano hayo alienda kuliona shamba hilo na kuwa muuzaji alikuwa ni mmiliki wa shamba hilo na ndiye alikuwa analilima muda wote"

That those words had never been adduced by DW2 as she only testified that she knew one Jail Asanagalwisye Mwasile who sold the suit land to the respondent and that there other persons who knows the said Jail to have owned the suit land however, that they were not called as witnesses.

As to the complaint that the tribunal erred when did not give parties opportunity to join necessary parties, according to Ms. Amenye where there is claim that a suit land was sold by another person, that person have to be joined in the case as a necessary party. On that she contended that the trial court had to take active role to order the parties to add that necessary party that is either one Jail Asangalwisye or an administrator of the estates would have been joined in the suit by the trial tribunal in order to facilitate effective and complete adjudication and resolution of all issues on dispute. She substantiated her contention with the decision in the case of **Tanzania Railways Corporation (TRC) v. GBP (T) Limited**, Civil Appeal No. 218 of 2020 CAT at Tabora. Ms. Amenye held the view that failure to join a necessary party renders proceedings decision and order of the trial tribunal vitiated.

Basing on the submission made, Ms. Amenye implored this court to allow the appeal quash the decision and set aside the order and grant costs of the suit.

In reply, on the complaint in the first ground of appeal the respondent assailed the contention that the trial tribunal misapplied the principle of adverse possession. He contended that the trial tribunal never said anything regarding the principle. Instead, that the tribunal

was of the view that the matter was time barred from when the respondent purchased the suit land used it without interruption of the appellant until 2023 when instituted the suit. That the appellant did not challenge the testimony of the appellant and his witness DW2 when they said that she was aware of the activities done by the respondent in the suit land. Thus, that the contention by the appellant that she became aware in 2019 is an afterthought and is as good as admission of the fact adduced. The respondent sought reliance on the case of **Six Ilanga @ Msaka v. Republic,** Criminal Appeal No. 484 of 2020 [2024] TZCA 95 (23 February 2024). Therefore, that this court should consider that the cause of action arose in 2005 and the appellant remained quiet until 2023 which is beyond 12 years limit in instituting land disputes.

On the complaint that the trial tribunal misconstrued the evidence, the respondent argued that all referred by the tribunal was testifies by the witnesses he referred this court at page 11 of the typed proceeding on what DW2 said. And thus, that the tribunal committed no error.

Submitting regarding the ground that parties were not availed with opportunity to join a seller as necessary party, the respondent argued that the appellant had never pressed for that prayer before the trial tribunal that raising it at this stage is an afterthought. Basing on Order I

rule 3 of the Civil Procedure Code, Cap. 33 R.E 2019 that the appellant was at liberty to join any party as defendant in the suit but did not do so which is his own fault. At the conclusion he prayed the appeal to be dismissed with costs.

In rejoinder, Ms. Amenye argued that Order I rule 3 of the CPC cited by the respondent is inapplicable in the instant matter rather, the trial tribunal would have acted under order I rule 10 (2) of the CPC to join any party for smooth adjudication of the suit. Other arguments were a reiteration of the submission in chief. On the case that failure to cross-examine a witness means admission of facts, she argued that the cited case is distinguishable since it was not refuted by the respondent on the appellant's claim that she knew the invasion of the suit land in 2019. She insisted on the previous prayers.

Having considered the rival submissions by Ms. Amenye for the appellant and that by the respondent the issue to be determined by this court is whether the appeal has merits. I will resolve the above grounds of appeal as conversed by the contending parties.

In the first ground of appeal Ms. Amenye argued that the principle of adverse possession was wrongly applied by the trial tribunal in favour of the respondent on the reason that having climbed to have purchased

the suit land, the principle of adverse possession did not apply. On this very account the respondent challenged it on the reason that the trial tribunal did not apply the principle of adverse possession but was of the decision that since it was beyond 17 years since the cause of action arose that is in 2005 to 2023 the appellant was barred by the time limit to institute a land dispute.

I have gone through the impugned judgment, the trial tribunal never talked about adverse possession. But in the course of reasoning that the appellant had failed to establish his claim, the tribunal held the view that since there was evidence that the respondent has been using the suit land for 17 years and the appellant has been alive of the said use it was the observation of the trial tribunal that 17 years of uninterrupted use is beyond 12 years which is time limit for instituting a land suit. It also held that since there was evidence that the appellant was just observing the respondent using the suit land without any interruption, the appellant slept on her right. In my concerted opinion, the holding by the trail tribunal does not mean applied an adverse possession principle. And the respondent never raised it as the defence but has given the evidence of long use to discredit the appellant's

evidence of being a lawful owner of the suit land. The first ground therefore, lacks in merit it is dismissed.

In the 2nd ground of appeal, Ms. Amenye held the view that the trial tribunal added its own words against the evidence adduced by the parties. The respondent refuted that complaint and referred this court at page 11 of the typed proceedings of the trial tribunal to justify that the impugned judgment reflects the evidence adduced by the parties. I am abreast of the trite law that court's decisions must be based on the evidence on record presented before it; see **Richard Otieno @ Gullo v. The Republic**, Criminal Appeal. No. 367 of 2018 [2021] TZCA: 124 [14 April, 2021; TANZLII]. However, if there is inclusion of statements which do not form evidence of the parties it must be established that they influence the decision of the court and prejudiced the party complaining about them.

In the matter at hand, I have revisited the evidence adduced by the parties to the suit vis-a-vis the complained words in the impugned decision. I have noted that DW2 stated that before she wrote the sale agreement she visited and witnessed the suit land and during cross examination which forms her evidence, DW2 stated that the vendor proved to have sold his property. The missing word in those complained

statement is the averment that the vendor was cultivating the suit property.

The minor issue for consideration is whether the added words which did not constitute the evidence presented by DW2 before the trial tribunal influenced the decision and prejudiced the appellant. It is my holding that they did not. This is because, the decision of the trial tribunal mostly based on the reason that the respondent had been using the suit land for so long in 2005 when he alleged to have purchased it. And the fact that the appellant was there seeing the respondent using the suit land but never complained and that the appellant's witness also substantiated that it is the respondent who had been using the suit land since 2006. In those circumstances, the appellant was not prejudiced and her counsel did not state if she was. The pertinent ground of appeal is thus dismissed.

The last ground appeal for consideration is the complaint that the trial tribunal erred when did not avail opportunity to the parties to join a necessary party. The respondent had the view that it was upon the appellant to press a prayer to the trial tribunal to join the seller if seems to be necessary party.

The issue for determination is whether a vendor allegedly to have sold the suit land to the respondent was a necessary party. Order I Rule 3 of the CPC provides that, all persons may be joined as defendants against whom any right to relief which is alleged to exist against them arises out of the same act or transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise. The provisions of the CPC cited above were emphasised by this court and the Court of Appeal of Tanzania in a number of decided cases including the cases of **Tanzania Railways Corporation vs GBP (T) Ltd** (supra), **Godfrey Nzowa vs Selemani Kova & Others** Civil Appeal No. 183 of 2019 CAT at Arusha (unreported), **Farida Mbaraka and Another vs Domina Kagaruki,** Civil Appeal No. 136 of 2006, CAT at Dar es Salaam (unreported) and **Abdullatif Mohamed Hamisi v. Mehboob Yusuph Othman and another,** Civil Revision No. 6 of 2017, CAT at Dar es Salaam (unreported). In the latter for example, the CAT was inspired by the decision from India in the case of **Benares Bank Ltd vs Bhagwandas,** A.I.R. (1947) All 18, in which the full bench of the High Court of Allahabad provided two tests for determining whether a party is necessary party to the proceedings that: **First**, there has to be a right of

relief against such a party in respect of the matters involved in the suit and; **second,** the court must not be in a position to pass as effective decree in the absence of such a party.

In the matter at hand, the alleged vendor of the suit land to the respondent was mentioned by the respondent in his defence to refute the appellant's claims that he invaded the suit land. I have not found any issue raised by the trial tribunal nor any relief claimed against the said vendor. Again, Ms. Amenye did not indicate in her submission as to how the absence of the alleged vendor of the suit land to the respondent did make the decision of the trial tribunal inexecutable. It was the respondent defence to establish how he get the suit land and there was no issue which its determination needed the presence of the vendor of the suit land.

Moreover, it was not upon the respondent to prove his denial that he did not invade the suit land but the duty to the appellant to prove that the respondent invaded the land. This is on the law that negative is incapable of proof. See the Court of Appeal observation in **Paulina Samson Ndawavya vs Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported), where it quoted comments from **Sarkar's**

Laws of Evidence, 18th Edition **M.C. Sarkar**, **S.C. Sarkar** and **P. C. Sarkar**, published by Lexis Nexis as below:

> "***...the burden of proving a fact rests 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 discharged the other party is not required to be called 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....***"

Deriving from the above principle of the law, I thus concur with the respondent's argument that if the appellant thought has any dispute against the alleged vendor of the suit land would have made him a defendant to the suit. The contention by Ms. Amenye that the trial tribunal would have exercised active role by requiring the parties to join

the vendor does not appeal to me for the fore given reason that there was no issue which its conclusive determination needed depended to the presence of the alleged vendor.

In the end, owing to the above discussion, I find the entire appeal lacking in merits. It is hereby dismissed with costs.

Ordered accordingly.

D.B. NDUNGURU

JUDGE

23/05/2024