IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
THE HIGH COURT OF TANZANIA
IRINGA SUB REGISTRY
AT IRINGA

LAND APPEAL NO. 10 OF 2022

ELIZABETH NINDI & GEORGE ANDREW NINDI
[As Administrators of the Estate of
the Late ANDREW NINDI] ..... APPELLANTS

VERSUS

1. FERDNANDA NZALALILA
2. VITUS KASIKE } **..... RESPONDENTS**
3. IRINGA MUNICIPALITY

(Appeal from the decision of the District Land and Housing Tribunal for Iringa District at Iringa)

(Hon. A. J. Majengo (Chairperson))

Dated the 05th day of December, 2022
in
Land Application No. 82 of 2018.

JUDGMENT

Date of last order: 17/05/2024.
Date of Judgement: 07/06/2024.

S.M. KALUNDE, J.:

This is an appeal against the judgment and decree of the District Land and Housing Tribunal for Iringa district sitting at Iringa (**"the DLHT"**) in Land Application No. 82 of 2018. In its decision, the trial tribunal dismissed the appellants suit for being devoid of merits.

The background to this appeal can be simply stated. In 1980, around the 3rd September, the late Andrew Nindi together with his wife, the Elizabeth George Nindi, allegedly purchased a piece of land known as Plot No. 110, Block "CC"

situated at Mkwawa Area within Iringa municipality (**"the suit property"**) from one Nelson Mtatuka. Thereafter, Andrew Nindi constructed a foundation around one part of the property and continued cultivating maize on the other part of the property. The late Andrew Nindi continued to be in lawful occupation of the suit property until the 25th June, 2005 when he passed away. Upon his demise, the applicant was granted letters of administration over his property as co-administrator. It is alleged that, around 2007, the 1st respondent trespassed into the said property.

In response to the trespass, Ferdnanda Nzalalila, the 1st respondent filed **Application No. ILA/MK/0008** at the Ilala Ward Tribunal. The suit at the Ward Tribunal terminated in favour of Appellants. Aggrieved by the decision of the trial tribunal, the 1st respondent appealed to the DLHT through **Land Appeal No. 08 of 2008**. In its decision, the DLHT made a finding that none of the parties had established their ownership over the suit property. In fact, the DLHT declared that the suit property was the property of one Chestino Makasi. Subsequently, the DLHT set aside the decision of the Ward Tribunal. Aggrieved by the decision of the DLHT, the 1st respondent appealed to this court through **Misc. Land Appeal Case No. 13 of 2008**. Upon hearing of the parties, this court concluded that there were procedural irregularities in the trial at the ward tribunal as a result the court ordered the matter be tried denovo. This resulted into the institution of Land

Application No. 82 of 2018, which is the subject in the present appeal.

In Land Application No. 82 of 2018 which was instituted at the DLHT, the appellants sought for judgment and decree against the respondents claiming for *inter alia* a declaratory order that the suit property is the property of the late Andrew Nindi and thus subject to their administration. They also prayed for an eviction order; permanent injunction; and costs of the suit. Having heard the parties, the DLHT declared the 1st respondent to be a lawful owner of the suit property. The appellant's case was subsequently dismissed with costs.

The brief evidence before the trial tribunal was as follows: **Elizabeth George Nindi (SM1)** informed the trial tribunal that her husband purchased the suit property from one Mzee Swedi in 1980 at the price of TZS 1,000.00. She said the suit property was located at Imalanongwa "B" street. To support her claim, she tendered in evidence a copy of the sale agreement between Mzee Swedi and the late Andrew Nindi (**Exhibit P2**). Pw1 stated further that at the time the land was not surveyed. After purchasing the suit land, they proceeded to elect a foundation. Pw1 added that during construction of the foundation, they were being guided by a sketch plan (**Exhibit P3**). She narrated further that, upon the demise of her husband in 2005, she was appointed as a co-administrator of his estate. She tendered in evidence letters of administration (**Exhibit P1**) which were granted by the court in 2006. She

added that after their appointment, they noticed that there were trespassers into the suit property and hence commencement of the initial suit that terminated with a retrial. Pw1 concluded with a prayer that the property be declared as the property of her late husband.

It is on record that at the time of the purchase of the suit property by the late Andrew Nindi, **Martin Lameck Mwaipopo (SM2)** was their neighbor. He testified that the said Mzee Nindi purchased the suit property from Mzee Swedi Kilembe who was an employee of the then Mkwawa Secondary School. He said that the purchased property had a kraal and a glass thatched house. According to Pw2, it was the presence of the thatched house on the suit property that made the late Nindi fail to apply for allocation of the land from the town council. Instead of applying for allocation to the town council, he contacted a surveyor to prepare him a sketch map of a house (Exh. P3) which he commenced building.

Pw2 testimony in cross-examination was that the late Andrew Nindi did not apply to the town council for land allocation and neither was he granted an offer over the said area. He also conceded that the land was later surveyed by the Municipal Council.

Machelina Zalawahe (SM3) was neighbor to Swedi Kilembe and a friend to the late Andrew Nindi. He testified that the said Mzee Swedi had a house and kept cows. Later he was ordered to vacate with his cows. It was at this point that he

decided to sale the suit property to the late Andrew Nindi. Pw3 stated that after the collapse of the original house, the late Nindi built a foundation for a new house. The witness went on to state that, sometimes later, trespassers invaded the plot and started to build a house over the suit property. When he was cross-examined about the whereabouts of the newly constructed house, the witness admitted that his compound was used to collect and store the building materials for the 1st respondent during the construction of the house on the suit property.

Mary John Sanga (SM4) moved to the area around 1999. She testified that the late Andrew Nindi was present by the time she moved in and that he was her neighbor around the area. She later became a Chairman of the Village government. According to her evidence, she once participated in resolving a dispute between Elizabeth Nindi, Mama Sambage and the 2nd respondent. Later, she advised the matter be taken to the Ilala Ward Tribunal.

In defence, **Ferdinanda Nzalalila (SU1)** testified that she was married to the late Venance Sambage who passed away in 2005. Thereafter, she was appointed an administratix. She tendered letters of administration (**Exhibit D1**) confirming her appointment. SU1 testified that the suit property was part of the estate of the late Venance Sambage. In her further testimony, SU1 stated that the late Venance Sambage purchased the suit property from Chestino Makasi. The agreement for the sale and purchase were admitted in

evidence as **Exhibit D2**. The offer of grant of right of occupancy issued to Chestino Makasi by the Iringa Town Council on the 20th May, 1983 was admitted in evidence as **Exhibit D3**. Finally, SU1 urged the court to dismiss the application with costs.

For his part, **Vitus Kasike (SU2)** testimony was brief. He testified that he does not own the suit property. He said that he was hired by the 1st respondent to supervise the construction of a house on the suit property. The witness stated further that he had no interest in the property; and that there was no evidence whatsoever that he was the owner of the suit property.

The last defence witness was **Mr. Abenance Kamomoga (SU3)**, a Senior Land Officer from the 3rd respondents' office. He informed the trial tribunal that, the records at the Iringa Municipal Councils' Land Office show that the suit property is the property of one Chestino Makasi. To substantiate his claims, the witness made reference to Exhibit D3, a copy of the letter of offer dated the 20th May, 1983. The witness added that, the records at the land registry show that neither the appellant nor the late Andrew Nindi were at any stage owners of the suit property.

The trial tribunal evaluated and weighed the above evidence and the opinion prepared by the wise assessor. Having done so, the learned chairperson was satisfied that the respondent's case was heavier than that of the appellants. The

learned chairman observed that the appellants had failed to prove their case to the required standard. On another limb, the trial tribunal observed that the 1st and 2nd respondent presented a strong and credible case against the appellants. Consequently, the trial tribunal declared that the 1st respondent was the lawful owner of the suit property and therefore she was not a trespasser on the suit property.

Aggrieved by the decision of the trial tribunal the appellant has approached this court to vent her grievances. Her memorandum of appeal contains the following grounds;

1. *That the trial land tribunal had no jurisdiction to entertain the matter, thus the judgment and decree extracted there at are null and void.*

2. *That, the learned trial tribunal Chairman erred in law and fact in holding that the 1st Respondent is a lawful owner of the suit land because she failed to prove her case on balance of probabilities as opposed to the evidence given and adduced by the Appellants.*

In light of the above grounds, the appellant prayed that the appeal be allowed by quashing the judgment of the trial tribunal and setting aside the resultant decree.

To argued the appeal, the appellant secured the services of Mr. Jessey Samuel Mwamgiga, learned advocate, whilst the 1st and 2nd respondent appeared in person unrepresented. The

third respondent enjoyed a representation of Mr. Nicholous Mwakasungura, learned State Attorney.

Before commencing his substantive submissions, Mr. Mwamgiga informed the court that he was abandoning the first ground of appeal and would focus his submissions on the second ground of appeal. In support of the second ground of appeal, the learned counsel argued that during trial the appellant (SM1) sufficiently established that her husband bought the suit property in 1980. The learned counsel added that, the evidence of the appellant was corroborated by the testimony of SM2, SM3 and SM4, who were neighbors to the suit property.

In the alternative, Mr. Mwamgiga argued that the appellant had stayed on the suit property for more than twelve years, thus she had acquired ownership of the property through adverse possession. To support his case, the learned counsel cited the case of **Moses vs. Loregrove** [1952] 2 QB 533; **Hughes v. Griffin** [1969] 1 All ER 460. In addition to that, the learned counsel faulted the decision of the trial tribunal for relying on the copy of the sale agreement (Exhibit D2) which was admitted in evidence in contravention of section 68 of **the Evidence Act [Cap. 6 R.E. 2019]**. He thus urged the court to expunge the said exhibit.

In light of the above submissions, the learned counsel prayed that the appeal be allowed.

The 1st and 2nd respondent's filed joint submissions, while the 3rd respondent filed a separate submission. However, the content of the submissions was the same. In fact, it was a case of copy and paste. The substance of the said submissions was that in terms of section 110 of the Evidence Act, the appellant had a duty to prove her case on the balance of probabilities. To support this, they cited the decision of this court in the case of **Eunice Mashaija Noveth & Another vs Ansibert Nkete** (Land Case Appeal 101 of 2020) [2022] TZHC 1035 (25 March 2022) TANZLII. In addition to that, they stated that the contradictions and pitfalls in the testimonies of SM1, SM2 and SM3 were so serious and thus justifying the conclusions of the trial tribunal. Regarding the admission of a copy of the copy of the sale agreement (Exh. D2) the respondents argued that the chairman considered the circumstances and the law applicable and was satisfied that there was no need of an original copy. They maintained that the chairman was not bound by technicalities and rules of evidence provided for under the Evidence Act.

In light of the above submissions, my duty now is to determine the merit or otherwise of the appeal. To begin with, I am aware that a first appeal is merely a continuation of trial proceedings by way of a rehearing and where circumstances warrant, a first appellate court may review and reevaluate the evidence and subject it to exhaustive scrutiny and come independently to its own conclusion as to whether the findings of the trial court can be supported. I will, therefore, proceed to

re-evaluate and re-examine the evidence on record with a view to come to my own findings of fact. In doing so, I shall be mindful of the now established position of law that, in civil proceedings, including land cases, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.

I also agree with the submissions by the respondents that, in terms of sections 110 and 111 of the Evidence Act, he who alleges must prove. For ease of reference, the respective sections read:

> *"110. - (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

Reverting to the instant case, there is no dispute that it was the appellant who filed the suit at the trial tribunal, therefore, in terms of the above provisions, it was her duty to prove that she was the lawful owner of the suit property. The evidence in support of her case came in the form of oral testimonies of SM1, SM2, SM3 and SM4, and documentary evidence which comprised a copy of the sale agreement

between Mzee Swedi Kilembe and the late Andrew Nindi (**Exhibit P2**).

In her testimony the appellant (Pw1) testified that her husband purchased the suit property is located at Imalanongwa "B" street at the purchasing price of TZS 1,000.00. Her evidence was supposed to be corroborated by the sale agreement between Mzee Swedi Kilembe and the late Andrew Nindi (Exhibit P2). I have carefully examined the testimony of SM1, SM2, SM3 and SM4, and the contents of the said agreement and noted that the appellants case had several discrepancies: **Firstly**, the agreement between Mzee Swedi Kilembe and the late Andrew Nindi (Exhibit P2) indicate that the land was purchased at the price of TZS 8,00/= and not TZS 1,000/= which Pw1 stated in her testimony. In the circumstances, it would appear that the appellant was not even sure of the purchase price of the land she claims to be the property of her husband. Otherwise, she was not aware of the contents of the said agreement.

Secondly, the said agreement (Exhibit P2) does not offer any description that would invite a suggestion that the suit property was the subject matter in the said agreement. To appreciate what I am about to say I think it would be instructive to reproduce the content of the said agreement. It reads:

> ***"KIWANJA CHA MKWAWA NO. 46***
> ***NYUMBA NO. 46***
> *Nimepokea kiasi cha Shs. 800/- zilizobakia*

kwa nyumba 46 leo tarehe 3 September, 1980 na sasa ni mali ya ANDREW FREDERICK NINDI wa Box 1222, IRINGA.

Kumi kumi: Sgd.

Kumi: Sgd.

Shahidi: Sgd.

Shahidi: Sgd.

Mtoaji Sgd."

The above excerpt show that it relates to ***"House No. 46 located at Mkwawa"***. It is also indicated that the remainder of Tshs. 800/- is being received 3rd September, 1980. The paper then says "It is now the property of Andrew Frederick Nindi of Box 1222, Iringa". I have assumed that the last phrase meant the said *"House No. 46 located at Mkwawa"* is now the property of Andrew Frederick Nindi.

Looking at the above description as contained under exhibit P2, it is clear that the property being referred is *"House No. 46 located at Mkwawa"*. In her testimony, Pw1 said the property is situated at Imalanongwa "B" street which is not indicated under exhibit P2. In addition to that, none of the appellants' witnesses, including the appellant herself, referred to the suit property as *"House No. 46 located at Mkwawa"*. If the suit property was previously known as *"House No. 46 located at Mkwawa"*, SM1, SM2, SM3 and SM4 could have stated as such or at least make a mention. But they did not give such a description. In the circumstances, chances are that *"House No. 46 located at Mkwawa"*, could have been a different property altogether and not related to the suit property.

Thirdly, the appellant and all of her witness failed to even offer a description of the property by stating its boundaries or neighbours to the property. In absence of proper evidence of description of the property allegedly purchased in 1980 by Andrew Nindi issuance of an executable decree would not be possible. It is also worth noting that because of the appellant lack of knowledge over the suit property, she ended up referring to the suit property as Plot No. 110, Block "CC" situated at Mkwawa Area withing Iringa municipality. She did so in her application as well as in her testimony before the tribunal. If the appellant knew the proper description of the suit property, she could have made her own description instead of making reference to the surveyed plot which she knew was never allocated to her by the relevant authorities.

In her testimony, the appellant tendered the sketch plan (Exh. P3) to show that the foundation on the suit property was built based on the said sketch plan. To begin with, beside mere words of the appellant and her witnesses, there was no concrete evidence that there was a foundation on the suit property let alone the fact that the foundation was based on the said sketch plan. In cross-examination she said that before constructing the said foundation they were permits issued by the Municipal Council, however, she failed to provide proof of such permits.

I have also examined the said plan (Exh. P3) and noted that there is no evidence that the plan was designed for the

house on the suit property as described by the appellant. In fact, the plan does not make any reference to a particular piece of land. The only reference available is hand written inscription on the plan which was written "Plot No. 110, Block "CC" Mkwawa". However, as I have pointed out above there is no evidence that "Plot No. 110, Block "CC" Mkwawa" was allocated to the appellant or the person to whom she claims ownership from.

The other striking phenomenon is the appellant evidence in cross examination. The records, at page 14 of typed proceedings, shows that when she was being cross-examined by Mr. Nashon Kayoka, learned counsel for the 3rd respondent, the appellant stated that she bought an un-surveyed land and requested the plot to be surveyed. After the plot had been surveyed it was named Plot No. 110, Block "CC" Mkwawa. However, she said she had no proof that she requested for the survey. She did not even know the size of the said plot. One wonders if really, she requested for the survey, why wouldn't the offer be under her husbands' name, and if it was not in her husband's name why didn't the husband or her follow up with the land office? She also said that her husband was paying rent over the suit property, however, she failed to tender any proof of receipts of the payments.

It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the

weakness of the apposite party's case. See **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) TANZLII and **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama** (Civil Appeal 305 of 2020) [2021] TZCA 699 (29 November 2021) TANZLII.

Guided by the above position, in the case under scrutiny, the burden was on the appellant rather than the respondent to prove that she was the lawful owner of the suit property. But as I have demonstrated above, the appellants' evidence was insufficient to discharge the obligation under sections 110 and 111 of the Evidence Act. In the end, looking at the evidence cumulatively, I am satisfied that, the appellant failed to discharge her obligations under sections 110 and 111 of the Evidence Act.

But, even assuming, for argument's sake that the appellant discharged her burden, I still think the evidence presented by the 1st and 2nd respondent was heavier than that of the appellant. In her evidence, the 1st respondent (SU1) testified that she was married to the late Venance Sambage. She also tendered letters of the administration (Exh. D1) confirming her appointment as the administratix of the estate of the late Venance Sambage. Regarding her ownership over the suit property, SU1 tendered a copy of the sale agreement (Exh. D2) between the owner of the suit property, one Chestino Makasi, and her husband Venance Sambage. The sale

was backed up by an offer of grant of a right of occupancy issued by the Iringa Town Council on the 20th May, 1983 (Exh. D3).

The offer (Exh. D3) is clear that Plot No. 110, Block "CC" Mkwawa, was offered to one Chestino Makasi on the 20th May, 1983. SU3, the land officer from the 3rd respondent confirmed that the records at the land registry recognizes that the suit property was allocated to Chestino Makasi. Through a sale agreement (Exh. D2) dated 23rd October, 1984, the owner of the offer, one Chestino Makasi, sold the plot to Venance Sambage.

It is trite that where two persons have competing interests over a piece of land the one whose name is in the register will always be taken to be lawful owner of the suit property. Unless, of course, it is established that such acquisition was unlawful or illegal. For this view I am supported by the case of **Amina Maulid Ambali & Others vs Ramadhani Juma** (Civil Appeal No. 35 of 2019) [2020] TZCA 19 (25 February 2020) TANZLII, in which the Court (Mwarija, J.A) at page 6 and 7 stated:

> *"In our considered view,* ***when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained****. In the case of* ***Leopold Mutembei*** *(supra) cited by Mr. Mutalemwa, the Court cited with approval the following excerpt from the book titled*

Conveyancing and Disposition of Land in Tanzania *by Dr. R.W. Tenga and Dr. SJ. Mramba, Law Africa, Dar es Salaam, 2017 at page 330: -*

> *"... the registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land.* ***The act of registration confirms transaction that confer, affect or terminate that ownership or interest****. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title."*
>
> *[Emphasis is mine]*

In the instant case, whereas the appellant's contention is that her husband purchased the suit property from one Swedi Kilembe, the respondent tendered documentary evidence showing that she has an offer of grant of a right of occupancy issued to Chestino Makasi by the Iringa Town Council on the 20th May, 1983. This evidence is backed up by the testimony of SU3. Additionally, the 1st respondent presented evidence that she purchased the suit property from Chestino Makasi, who was granted such an offer. From the record, the available evidence supports a finding of the learned trial chairperson that the 1st respondent is the lawful owner of the suit property.

Turning to the complaints regarding the admission of photocopy of the sale agreement (Exh. D2). I think the complaint is unfounded because upon examination of the

records I have noted that the said document was in fact original save that it was laminated. In my view, the lamination did not take away its originality. The document was also affixed with a stamp duty. However, even assuming that it was not original, the learned trial chairman examined the same and was satisfied that it was worth of believe and necessary for the determination of the case. Yet again, even if the said document is expunged, the evidence of the 1st respondent (SU1) is sufficient to establish that there was an agreement between Chestino Makasi and Venance Sambage. The evidence of SU1 is also supported by the offer of a right occupancy and the testimony of SU3. The complaint that the document was illegally introduced in evidence is thus devoid of merits, and the same is dismissed.

On another limb, Mr. Mwamgiga had argued that the trial tribunal had not considered the appellant had acquired possession over the suit property due to her long occupancy. This will not detain me much. As I am aware adverse possession does not apply automatically in registered land such as was in the present case. This view was stated by the Court of Appeal in the case of **Attorney General vs Mwahezi Mohamed & Others** (Civil Appeal 391 of 2019) [2020] TZCA 27 (26 February 2020) TANZLII; in which the Court (Kerefu J.A)

> *"In our considered opinion,* ***the trial Judge correctly applied the doctrine of adverse possession, because unlike in an***

unregistered land, the adverse possession over the registered land is not automatic. *We have as well observed that the appellant claimed adverse possession only by asserting that he had been in occupation of the suit land over forty (40) years. This assertion is incorrect as we have decided in the case of* ***Registered Trustees of Holy Spirit Sisters Tanzania*** *(supra) cited to us by Mr. Musetti at page 24 that: -*

> *"In our well-considered opinion, neither can it be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession,* ***Possession and occupation of land for a considerable period do not, in themselves, automatically give rise to a claim of adverse possession.***"
>
> *[Emphasis added].*

Similarly, in the case at hand, the appellant cannot claim ownership over the suit property by an adverse possession without following the legal procedure entailed under section 37 of the Limitation Act."

[Emphasis is mine]

I have pointed out above that Plot No. 110, Block "CC" Mkwawa is registered in the name of Chestino Makasi. This was also confirmed by SU3. The appellants claim of ownership through adverse possession is therefore unfounded. In addition to that, it would also appear that, the appellant was riding two horses at the same time by claiming that she purchased the suit property from Mzee Swedi while at the same time claiming ownership through adverse possession. As I am aware, one

cannot claim ownership through adverse possession and through purchase at the same time. This complaint is also without merits.

For the foregoing reasons, this appeal is not merited. I hereby dismiss it in its entirety with costs

It is so ordered

DATED at **IRINGA** this **07th** day of **JUNE, 2024**.

S.M. KALUNDE

JUDGE