IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

LAND APPEAL NO. 17 OF 2023

(Originates from Land Application No. 34 of 2020 in the District Land and Housing Tribunal for Rukwa at Sumbawanga)

DICKSON NAMAKONDE ..... APPELLANT

VERSUS

KINANJA MSALANJI ..... 1ST RESPONDENT
PETER MSALANJI ..... 2ND RESPONDENT
CHARLES MSALANJI ..... 3RD RESPONDENT
FEDELIKO MSALANJI ..... 4TH RESPONDENT

JUDGMENT

MWENEMPAZI, J.

In this appeal, the appellant is aggrieved by the decision of the District Land and Housing Tribunal (Hon. J. Lwezaura, Chairperson) dated 23/03/2023. The appellant (applicant) filed an application claiming for 22 acres of land located at Kachu Hamlet within Kalole Village. It was alleged by the applicant that the respondents had trespassed into the dispute land measuring 22 acres which land is bordering the land belonging to the late Sinkala Mawelo and the late Kalangazya. The land was given to him by his late father in

1967. The applicant prayed to be declared as the lawful owner of the dispute land and that the respondents be evicted from the said land. He also prayed for the costs of the application. Upon hearing of the application, the trial tribunal dismissed the application with costs. The trial tribunal in its decision found that the appellant who was then an applicant had failed prove his claims; hence his application was dismissed; that the respondent are lawful owners of the dispute land and that the applicant is condemned to shoulder the cost of the application. The applicant has raised grounds of appeal as follows: -

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 evaluating the evidence on ownership of the disputed land which was adduced by the parties hence reached to wrong decision.
3. That the trial tribunal erred in law and fact by giving a contradictory judgment on whom between the respondents was declared to be the lawful owner of the disputed land.
4. That the trial tribunal erred in law and fact since the evidence on record does not support the judgment.

5. That the trial tribunal erred in law and fact by holding that the respondent are the lawful owners of disputed land while at the time of the alleged acquisition some were minor.

The case has four respondents who are relatives, drawing form the surname they share. However, the 1st respondent one Kinanja Msalanji decided to settle the matter out of court and the record has a document titled ***"Hati ya kumaliza Rufaa nje ya Mahakama dhidi ya Mjibu rufaa wa kwanza".*** In the said document the 1st respondent has stated that the 1st respondent is handing over to the appellant **$1^1/^2$ acre farm which was awarded to the appellant by the District Land and Housing Tribunal.** The first respondent has denied a signature appended to the joint written submission by the respondents.

Parties to this appeal sought leave to submit on the appeal by way of written submission, which prayer was granted. They duly complied to the scheduling order. Peter Kamyalile was representing the appellants and the respondents were unrepresented.

In the submission by the counsel for the appellant; he has prayed to drop and or abandon ground 4 and 5 of appeal. In his submission for the 1st

ground of appeal, the counsel has argued that the trial tribunal erred in law and fact in evaluating evidence based on the principle of adverse possession. He has submitted that, it is a principle of law that where a person adduced evidence that he had a right of entrance on the disputed land then the principle of adverse possession cannot be applied.

In the present case the respondents testified that they had rights of entrance because they were given the disputed land, and the 3rd respondent testified to inherit it. Therefore, it was wrong to apply the principle of adverse possession. The counsel has cited the case of **Evalist Kanoni Vrs. Andifasi Chenga,** Miscellaneous Land Appeal No. 13 of 2020, High Court of Tanzania at Sumbawanga (Unreported) where it was held that: -

> *"According to the respondents own testimony before the trial tribunal, he inherited the suitland from his father, the late Anatory Chenga, who bought the land from another person. Therefore, since the respondent testified to have had a right of entry as an heir, he cannot again claim to be the owner of the disputed land through adverse possession. In the absence of cumulative proof of the*

factors listed hereinabove on part of the respondent, it was unjustifiable for the appellate tribunal to reverse the decision of the ward tribunal".

On the second ground of appeal the appellant complains that the trial tribunal erred in law and fact in evaluating the evidence on ownership of the disputed land which evidence was adduced by the parties. He contends that it led the tribunal to arrive at a wrong conclusion.

The appellants counsel has submitted that the appellant acquired the dispute Land in 1967 by way of gift inter-vivo from his father Sauti Namakonde. SM1 and SM3 who are bordering the dispute land testified and proved that the disputed land was earlier on being owned by the appellant's father. He in turn, acquired the same by clearing the virgin forest. That evidence is supported by SM1, SM2, SM3 and SM4. The witnesses testified that they were five and the giving of the same was at the disputed land. He has submitted that the evidence adduced meets the conditions for the applicability of the principle of gift inter-vivos laid down in the case of **Ernest Sebastian Mbele vrs Sebastian Mbele and 2 others,** Civil Case No. 66 of 2020, Court of Appeal of Tanzania at Iringa where at page 12 it was held:-

"The gift inter-vivos can be proved by the following detailed, number of witnesses who were present names of the witnesses who were present, and the place where the gift was made"

The appellant's counsel has also submitted that any evidence led by any of the parties which does not support the averments in the proceedings goes to no issue and must be disregarded. The evidence adduced by the respondents does not support the pleadings.

In their written statement of defence, paragraph 2(1) they replied that the land in dispute is legally owned by the respondents who inherited the same from their fore father. They pleaded that they acquired the disputed land by way of inheritance.

The counsel for the appellant has cited examples of evidence adduced by the 1st, 2nd and 4th respondent that it does not support the averment in the pleadings. The 1st respondent has stated that he was given 1.5 acres by his father in 2018; the 2nd respondent stated that he was given 5 acres by his father in 1999 and the 4th respondent stated that he was given 3 acres in 2012 by his father after he has married.

The counsel has cited the case of **Makori Wasaga Vrs. Joshua Mwaikambo and Another [1987] TLR 88** and **the Registered Trustees of Roman Catholic Archdiocese of Dar es Salaam Vrs. Sophia Kamani,** Civil Appeal No. 158 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported) page 10 – 11 where it was held: -

> *"...parties are bound by the pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with averments of the pleading goes to no issue and must be disregarded".*

The respondents also failed to prove that they were given the dispute land. They failed to give any detailed account when testifying. Even to give names and place as was required in the case of **Ernest Sabastian Mbele** (supra). Also, they failed to prove if they inherited the dispute land as alleged in the pleadings. That would have been achieved by filing the inventory and the accounts which are the documentary exhibits expected to be tendered to verify that the land was bequeathed to them. He cited the case of **Madein Ally Mohamed and 3 Others Vrs. Shame Ally Mohamed and Another,**

Civil Appeal No. 272 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 12 - 13 where it was held that:

> *"The inventory and the accounts, which must be filed in the court that appointed the administrator, in terms of the above law are the documentary exhibits we expected to be the evidence to be tendered by the appellants in arguing that the disputed land property was bequeathed to them".*

On ground 3 of appeal, the appellant has complied that the trial tribunal erred in law and fact by giving a contradictory judgment on whom between the respondents was declared to be the lawful owner of the disputed land the appellant has submitted that the dispute is over 22 acres, and out of it 1st respondent testified that he owns 1.5 acres, 2nd respondent owns 5 acres; and the 3rd respondent owns 2 acres and 4th respondent owns 3 acres, which makes a total of 11.5 acres. In the judgment of the trial tribunal it was decided that the whole 22 acres belong to the respondent. It is not known who among the respondents was declared to be the lawful owner of the dispute land. The judgment did not determine the owner of the 11.5 acres.

It is the opinion of the appellant the judgment is defective, since it leaves contested material issues of the facts unresolved. The counsel for the appellant cited the case of **STANSLAUS RUGABA KASUSURA AND ATTORNEY GENERAL VERSUS PHARES KABUYC [1982] TLR 338** where it was held that: -

> *"The judgment is fatally defective, it leaves contested material issues of fact unresolved. It is not really a judgement because it decides nothing, in so far as material fact are concerned. It is not a judgment which can be upheld or up – set. It can only be rejected".*

The counsel has therefore opined by inviting this court to exercise its power as a first appellate court to re – evaluate the evidence adduced at the trial and make factual findings there from. He has referred this court to the case of MWAJUMA MBEGU VERSUS KITWANA MANI [2004] TLR 410.

Finally the counsel has prayed for an appeal to be allowed and that the judgment of the District Land and Housing Tribunal be quashed and that the appellant be declared as the lawful owner of the disputed land and the payment of the cost of this appeal.

In reply to the submission in chief the respondents have submitted that the appellant was wrong to suggest that trial tribunal erred relying on the principle of adverse possession when determining the dispute. It is their submission that the trial tribunal did pronounce that the respondents were in occupation of the disputed land and therefore there was no chance the trial tribunal could interfere the said occupation. They referred to the case of **Evarist Kanoni Vs. Adnifasi Chenga Mesa**, Land Appeal No. 13 of 2022 High Court of Tanzania, (Sumbawanga sub registry) that it is distinguishable. It is also the respondents' submission that the allegation that the dispute land was given to the appellant by his father saut Namakonde in 1967 is a cooked up story.

They have also submitted that the analysis made was correct as the trial tribunal disbelieved the evidence by the appellant. They have argued and submitted that in 1967 their fore fathers of the respondents were in occupation of the suit land, it is doubtful on how a gift was given to the appellant; from then up to this time the Msalanji family has been in occupation of the land in dispute.

The respondents have averred that their evidence is more probable than that of the appellant thus they were rightfully declared as the lawful owners of the suit land as it was established in the case of **Hemedi Said Vs. Mohamed Mbitu [1984] TLR 113**.

The respondent obtained the dispute land by inheritance. Allegation that they have failed to produce an inventory and an account is meritless. If the appellant needed to see the said documents, he would have sued the administrator of the estate of the *"late parents of the respondents"* (quoted as submitted).

The respondent pray that the appeal be dismissed with costs and the decision of the trial tribunal be upheld.

As I was reading this case to compose the judgment, I found it difficult to comprehend the proceedings vis a vis the claims by the appellant who was the applicant in the District Land and Housing Tribunal. As I went back to revisit the application, I found that the land, which is being claimed, is described as follows:

> *"3. Location and address of the suit premises; 22 acres located at Kachu Hamlet within Kalole Village.*

4. Estimated valued of the suit property four million Tshs. 4,000,000/=".

I therefore resolved to summon parties for clarification of the submission they had filed. Generally, the appellant was absent on 29/02/2024 when parties appeared before me but his advocate Mr. Peter Kamyalile was present. The respondents were present. The advocate admitted to the insufficiency of the description of the land as required by Order VII Rule 3 of the Civil Procedure Code, [Cap 33 R.E 2022].

On their part, the respondent informed this court that the dispute area is occupied by Msalanji clan and some of them were not sued and made part of the claims. What transpired the applicant was called on to show the area, he walked around and the cetre piece of land which was surrounded the perimeter he walked through measured 22 acres. Thus, there are other parties who are not part of the case but are affected by the case at hand. In fact they went far as to mention a part of village land where there is a water source (chanzo cha maji).

After a consideration of what had been said by the parties, I had to look back at the law. Order VII Rule 3 of the Civil Procedure Code provides that:

"Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case such property under the Land Registration Act, the plaint shall specify such tittle number".

In my search for the way forward, I came across the copy of Land Case No. 1 of 2022 **Tulito Alaraha and 13 Others Vs. The Assistant Commissioner for Lands, Manyara Region and three Others,** High Court – Manyara sub registry where Barthy J. observed in the description of the land:

"it is necessary for the plaint to indicate the boundaries of the suit land or any form of description that would sufficiently identify and distinguish the suit land".

In the above-cited case the Honourable Judge also cited the case of **Fereji Said Fereji Vs. Jaluma General Supplies Ltd and Others,** Land Case No. 86 of 2020 (unreported) where it was held:

"The essence of this provision needs not be over emphasized. This helps the court in establishing the

territorial jurisdiction and most importantly, assist in issuing executable orders as well".

In this case the complaint made by the appellant and also respondents shows there is vagueness in the description of the dispute land itself and parties to the dispute land which has led to an incomprehensible submission by the parties and even a decision which is suggested by the appellant that it be rejected.

In the case of **Mwanahamis Habib & others vrs Justin Ndunga Lyatum (as the administrator of the estate of the late Justine A. Lyatum and 173 others,** Land case No. 130 of 2018 (Unreported) it was observed that:-

"The purpose of authentic identification of the land in dispute is nothing other than to afford courts with a chance to make certain and executable orders... In other words non-description of the suit property renders the case incompetent before the court."

In this case, there is no sufficient description of the land and since it is occupied even those occupying the land some are not parties to claims.

Under the circumstances and in order to have effective resolution of the dispute I find the application contravened the provision of Order VII Rule 3 of the Civil Procedure Code and hence the same rendered incompetent.

For the reason stated, I allow the appeal, quash the judgment of the trial court and set aside the decree. I refrain myself from issuing an order for cost as the position taken results from the opinion of the court. If the appellant wishes, he may file a fresh application according to the dictates of law.

It is orders accordingly.

Dated and signed at Sumbawanga this 7th March, 2024.

T.M. MWENEMPAZI

JUDGE

Judgment delivered in the court in the presence of the appellant and 2nd respondent to 4th respondent the 1st respondent was absent.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

T.M. MWENEMPAZI

JUDGE

07/03/2024f