

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND CASE APPEAL NO. 47 OF 2023

(Originating from Application No. 16 of 2022 of the District Land and Housing Tribunal of Same at Same).

ELIAMINI HEMEDI MIGAYO APPELLANT

VERSUS

NAELIJWA HEMEDI MIGAYO RESPONDENT

JUDGMENT

28/11/2023 & 23/01/2024

SIMFUKWE, J.

The Appellant Eliamini Hemedi Migayo sued the respondent Naelijwa Hemedi Migayo before Same District Land and Housing Tribunal praying to be declared the lawful owner of the disputed land measuring 70 X 70, located at Kalung'oyo Malaria, Vuje Ward within Same District in Kilimanjaro Region. The appellant alleged before the trial tribunal that he acquired the disputed

land from his late father and his late brother in 1972. The respondent Naelijwa Hemedi Migayo told the trial tribunal that when their father passed away in 1981, he had not distributed the farms. Thus, their elder brother Frank Hemedi (SU2) was appointed to be the administrator of the estate of their deceased father. In 1992 they conducted a family meeting and divided the farms whereas the respondent was given two acres. In 1993, she built a house and stayed there for ten years. Thereafter, she moved to her husband at Kalung'oyo and continued to cultivate her land. In 2017, the appellant started encroaching the land of the respondent and cutting trees. When asked by the respondent, the appellant replied that women have no inheritance. The appellant was called by their brother after the respondent had complained to him, but the appellant refused and continued to cut trees of the respondent. SU2 and SU3 supported the story of the respondent. The appellant did not call any witness to support his evidence.

The trial tribunal decided in favour of the respondent. Hence, the appellant filed the instant appeal on the following grounds:

- 1. That, the trial Tribunal erred in law and fact by deciding that the Respondent is the legal owner of the disputed land while the Appellant is the legal owner of the disputed land given*

oral (sic) by his late father since 1972 and developed the said disputed land by planting different types of food crops such as onions, cassava and ginger and different trees such misaji and miti kunuka. (sic)

- 2. That, the trial Tribunal erred in law and fact by deciding that the Respondent is the legal owner of the disputed land without considering adverse possession that the Appellant has possessed the said suit land for fifty years.*
- 3. That, the trial Tribunal erred in law and fact by concentrating the Respondent witness as Administrator of the late Hemedi Migayo while in 1972 the time when the Appellant was given the disputed land by his father, the said Respondent's witness was not present was charged with theft and sentenced to jail. (sic)*
- 4. That, the trial Tribunal erred in law and fact by concentrating the said Respondent's witness the Administrator of the late HEMEDI MIGAYO that the disputed land was part of deceased properties while it was not among of deceased properties it was already given to Appellant, the administrator wrongly*

counted the disputed land as among the deceased's property.

(sic)

5. That, the Respondent's witness agreed before the ward Tribunal and trial Tribunal that for those who were given the land before the death of their father should go on using the said land which was given before the death of their late father.

The appellant prayed the appeal to be allowed with costs and declaration that he is the lawful owner.

The appeal was argued orally and both parties had no representation. Thus, their submissions were very brief.

The appellant submitted that the respondent alleged that she was given the disputed land in 1992 by their deceased father who died in 1981, while the said land was given to him in 1972 by his father. He said that he was not sure how the deceased gave the said land to the respondent while he had been in the grave for eleven years.

The respondent replied that it was true that their father died in 1981. In 1992 they convened a meeting as a family and distributed the land which was left by their deceased father. Then, the disputed land was distributed to her and she built a house on it. That, the appellant has been complaining

that women are not supposed to inherit land. He has been cutting the trees of the respondent while he has his own land.

I have considered the grounds of appeal, the oral submissions of both parties and the trial tribunal's record. The raised grounds of appeal raise two issues; evaluation of evidence (1st, 3rd 4th and 5th ground) and the issue of adverse possession (2nd ground).

Starting with the first issue of evaluation of evidence, in civil cases evaluation of evidence is based on the principle whether on balance of probabilities, whose evidence is more credible than the other.

The Court of Appeal in the case of **Paulina Samson Ndawanya v. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017** (unreported) held that:

"It is equally elementary that since the dispute was in civil case, the standard of proof was on balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."

In its decision against the appellant, the trial tribunal at page 3, 4th paragraph of its judgment observed that:

*"Mwombaji katika shauri hili hakuita shahidi yoyote kuunga mkono madai yake. Ameeleza alipewa shamba na baba yake na kaka yake mwaka 1972 na ameendelea kulima shamba hilo mpaka mwaka 2022 kwa muda wa miaka 50 lakini ameshindwa kuita shahidi kushuhudia kama kweli alipewa shamba hilo na amekuwa katika eneo hilo kwa miaka 50 pamoja na kwamba waliompa kwa sasa ni marehemu. **Kwa ushahidi wake pekee na bila kuwepo na kielelezo chochote cha kukabidhiwa ardhi hiyo baraza halitaweza kuamini maneno matupu ya mwombaji. Kulipaswa kuwepo na mashahidi wanaounga mkono ushahidi wa madai yake.**"*

Emphasis added

I am aware that in law evidence of even a single witness can suffice for one to succeed in a case. However, from the above reasoning of the trial tribunal, I support the findings of the learned Chairman that in the circumstances of this matter the appellant could have gone an extra mile by summoning witnesses who could cemented his assertion that he is the owner of the disputed land and that he has been in possession of the said land for 50 years. On the other hand, the respondent called two witnesses including SU2 Frank Hemed their brother and administrator of the estate of their late father

to support her case. I hesitate to believe what was averred by the appellant that the disputed land was given to him by their deceased father in 1972. The appellant did not state why SU2 decided to divide the same land to the respondent. As an established principle of law, the appellant had the onus to prove what he alleged on balance of probabilities. In the case of **Jackson Sifael Mtares & Others vs The Director of Public Prosecutions (Criminal Appeal 180 of 2019) [2021] TZCA 612** at page 17 it was held that:

"The standard of proof on a balance of probabilities simply means that, the court will sustain such evidence which is more credible than the other on a particular fact proved."

Moreover, it is trite law that in matters of assessment of credibility of witnesses and weight of evidence, courts/tribunals of first instance are the best. In the case of **Ibrahim Ahmed v. Halima Guleti (1968) HCD 71, Cross J.** (as he then was) held that:

".... Surely, when the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence."

In another case of **Ali Abdallah Rajab v. Saada Abdallah Rajab [1994]**

TLR 132, it was stated that:

"Where a case is essentially one of fact in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to erroneous conclusion."

Guided by the cited case laws, I am of settled opinion that evidence of the respondent in this matter outweighed that of the appellant as her evidence was more credible and reliable compared to that of the appellant.

On the issue of adverse possession raised on the second ground of appeal, the appellant stated that he had possessed the disputed land for fifty years. With respect to the appellant, one cannot claim adverse possession where the disputed land is alleged to have been given to him. Adverse possession may be raised where the disputed land was abandoned by the owner and the adverse possessor was not given the said land nor invited to the said land. In the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016** (unreported), the Court of Appeal of Tanzania held that:

*"... a person seeking to acquire title to land by adverse possession had to **cumulatively prove the following:***

a) That, there had been absence of possession by the true owner through abandonment;

b) That, the adverse possessor had been in actual possession of the piece of land;

c) That, the adverse possessor had no colour of right to be there other than his entry and occupation;

d) That, the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;

e) That, there was a sufficient animus to dispossess and an animus possidendi;

f) That, the statutory period, in this case twelve (12) years has elapsed

g) That, there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

h) That, the nature of the property was such that in the light of the foregoing, adverse possession would result."Emphasis mine

In another case of **Origenes Kasharo Uiso vs Jacquilin Chiza Ndirachuza, Civil Appeal No. 259 of 2017**, (unreported), the Court of Appeal of Tanzania cemented that:

*"No declaration can be sought on the basis of adverse possession in as much as **adverse possession can be used as a shield and not as a sword the appellant cannot rely on the principle of adverse possession in a case which he is a plaintiff.**"* Emphasis added

Therefore, in the case at hand, since the appellant alleged that the disputed land was given to him by his deceased father in 1972, and the fact that he is the one who instituted the dispute, he cannot claim adverse possession successfully.

In the upshot, I find no reason to fault the decision of the District Land and Housing Tribunal. The same is hereby upheld. Appeal dismissed with costs. It is so ordered.

Dated and delivered at Moshi this 23rd day of January, 2024.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

23/01/2024