IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

MISCELLANEOUS LAND CASE APPEAL NO. 11 OF 2012

(From the decision of the District Land and Housing Tribunal of Iringa District at Iringa)

STELINA KAKINGO ---------- APPELLANT

VERSUS

PATRICK NGWALE ---------- RESPONDENT

30/03/2015 & 16/04/2015

JUDGMENT

KIHWELO, J.

This is an appeal against the decision of the District Land and Housing Tribunal in which Hon. A. Mapunda allowed the appeal from the Ward Tribunal by quashing the decision of the Ward Tribunal. The appeal before Hon. A. Mapunda was from the decision of the Ward Tribunal for Kising'a which declared the current appellant to be the lawful owner of the suit premise (shamba) located at Mkungugu Village in Iringa Rural District.

A brief back ground to this very old case show that the current appellant referred a complaint before the Ward Tribunal against the current respondent alleging that the respondent has trespassed into the appellant's farm located at Mkungugu village within Kising'a Ward. Following the hearing of the matter at the Ward Tribunal the appellant emerged the winner and the Ward Tribunal declared him the lawful owner and required the respondent to pay costs.

Dissatisfied with the Ward Tribunal's decision the current respondent filed an appeal before the District Land and Housing Tribunal which upon hearing the appeal decided the appeal in the respondent's favour hence the current appeal.

In support of the appeal the current appellant has filed a two grounds Memorandum of Appeal namely;

(1) That, the honorable District Land and Housing Tribunal erred in law and fact for not considering the doctrine of adverse possession since the appellant possessed the disputed land since 1994.

(2) That, the honorable District Land and Housing Tribunal erred in law and fact by ignoring the opinion of the wise assessors without providing any genuine reasons thereof.

On the direction of the court parties presented Written Submissions according to the schedule which was set by the court.

Amplifying on the first ground of appeal the appellant argued that the appellant has been in continuous occupation of the suit land since 1994 having been legally allocated by the competent authority hence the doctrine of adverse possession applies. The appellant invited the court to refer to the case of **Coerce V Appuchang** (1912) AC 230 which defines the term adverse possession as well as Part I of the schedule to the Law of Limitation Act Cap 89 RE 2002.

The appellant further sought to invite this court to rule out that the respondent has no locus stand. He invited the court to refer to the case of **Lujuna Shubi Ballonzi V The Registered Trustees of Chama cha Mapinduzi** (1996) TLR 203 where the court had an opportunity to consider the issue of locus stand and held that;

> *"In order to maintain proceedings successfully the Plaintiff or an applicant should not only show that the court has power to determine the issue but also he is entitled to bring the matter before the court."*

Finally the appellant submitted in his conspicuously short submission that the learned Chairman of the Tribunal disregarded the opinion of the wise assessors without providing genuine reasons. He therefore argued that the appeal be allowed by quashing the decision of the District Land and Housing Tribunal.

Arguing in reply to the first ground of appeal the respondent stated that the doctrine of adverse possession is embodied in our law under Section 33(1) of the Law of Limitation Act, Cap 89 RE 2002 and that for it to apply one must prove actual possession, open, exclusive, continuous and unintempted for the statutory period which can not be proved by the appellant.

The respondent arguably stated that even though her claim was valid it cannot be advanced now through back doors as the same was not advanced neither at the Ward Tribunal nor at the District Land and Housing Tribunal hence the Hon. Chairman would not have considered something which was not in existence by then.

The respondent argued further that he has the locus stand as the Administrator of the late David Stanley Ngwale pursuant to the letter of Administration dated the 12th March, 2009.

In reply to the second ground of appeal the respondent submitted that the Hon. Chairman is not bound by the opinion of the assessors by virtue of Section 24 of the Land Disputes Act No. 2 of 2002 but rather he is bound to give reasons which he did.

The respondent therefore humbly submitted that the appeal be dismissed with costs and the decision of the District Land and Housing Tribunal be upheld.

The central issue for determination in this appeal is whether the Hon. Chairman of the District Land and Housing Tribunal failed to take some material point or circumstance into account and therefore came to an erroneous conclusion.

I think it will be an absurd and abuse of the court process to uphold the appellant's contention that the doctrine of adverse possession should be envoked at this juncture. Fairness demands that a party who intends to raise a preliminary issue should do so at an earliest opportunity. In the present case the appellant ought to have raised the issue in question before the Ward Tribunal or at least the District Land and Housing Tribunal but chose not do so for the reasons best known to herself. The appellant cannot be allowed to do so now after a period of four years.

I am inclined to agree with the submission by the respondent that the Hon. Chairman rightly took the position by not agreeing with the opinion of the wise assessors and gave his reasons pursuant to Section 24 of the Land Disputes Courts Act Cap 216 RE 2002 which reads;

> *"In reaching decisions the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

The Hon. Chairman categorically stated in his judgment that he differed from the opinion of the wise assessors on account of the evaluation of evidence.

My final observation equally important is the legality and propriety of the respondent suing or being sued in his own name for the estate of his late brother David Stanley Ngwale. The appellant has raised this belatedly and the respondent has admittedly confessed that he was granted the letter of administration by Isimani Primary Court since 12th March, 2009 well before the dispute in relation to the suit land was commenced before the Ward Tribunal on 6th December, 2011 hence it is just legal and logic that the respondent Patrick Ngwale ought to have been sued or sue as legal personal representative of the Estate of the late David Stanley Ngwale and not in his own capacity as it stands.

It is a cardinal principle of law as stated in the case of **Ali Abdallah Rajab V Saada Abdallah Rajab & Others** (1994) TLR 132 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 has come to an erroneous conclusion."*

In the light of the above considerations, I find that the proceedings of both the District Land and Housing Tribunal as well as that of the Ward Tribunal are a nullity for omission of the late Daniel Stanley Ngwale the late owner of the suit land. I accordingly nullify the entire proceedings at the Ward Tribunal as well as the District Land and Housing Tribunal and order that a fresh trial be conducted which will include the name of the deceased Daniel Stanley Ngwale.

Ordered accordingly.

P. F. KIHWELO

JUDGE

16/04/2015

Right of Appeal is fully explained.

P. F. KIHWELO

JUDGE

16/04/2015