IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND APPEAL NO.121 of 2017
(From the decision of the District Land and Housing Tribunal of IFAKARA in Land Appeal No. 41 of 2016 and original Ward Tribunal of Ifakara in Complaint No. 35 of 2015]

THABIT MOHAMED MGWALU .....APPELLANT
VERSUS
MORSADI HASSAN MALENDE.....1ST RESPONDENT
SAUDA ALLY MALENDE.....2ND RESPONDENT

Date of Last Order: 22.03.2018
Date of Judgment: 11.5.2018

JUDGMENT

S.A.N WAMBURA, J:

Aggrieved by the decision of the District Land and Housing Tribunal of Ifakara in Land Appeal No. 41 of 2016 which overruled the decision of Ifakara Ward Tribunal the appellant **Thabit Mohamed Mgwalu** has filed three grounds of appeal being;-

1. *That the Hon. Chairman erred in law to decide in favour of the respondents without regarding the issue of adverse possession as the appellant use the land in dispute since 1970.*
2. *That the Tribunal erred in law and fact for failure to take into account that the appellant has planted permanents crops and the respondents trespassed into land in dispute and sell without prior consent of the appellant.*

3. *That the Hon. Chairman misleads himself by disregarding the credibility of evidence of the appellant adduced at the Trial Tribunal which pay visit to the land in dispute hence pronouncing problematic judgment.*

He thus prayed that the said decision be quashed and the appeal be upheld with costs.

In their reply to the Petition of Appeal the respondents **Morsadi Hassan Malende** and **Sauda Ally Malende** challenged the appeal praying for its dismissal with costs.

It is on record that having heard both parties and their witnesses, the Ward Tribunal also visited the suit premises. The trial Ward Tribunal found in favour of the appellant and declared him as the lawful owner of the suit premises. Aggrieved by the said decision the respondents therein its appealed to the District Land and Housing Tribunal. It overruled the decision of the trial Ward Tribunal and found in favour of the respondents on the ground that the suit premises belonged to the respondents' late father.

At the hearing of this appeal the appellant appeared in person unrepresented whereas the respondents enjoyed the legal services of Mr. Kusalika Advocate.

The court thus granted leave for hearing of the appeal to proceed by way of written submissions. I thank both parties for adhering to the schedule.

The appellant submitted on the three grounds of appeal jointly. He alleged to be the lawful owner of the disputed land as he has been living peacefully in the area in dispute for a long time since 1970. He alleged that he grew permanent crops within the disputed land and the respondents never disputed of the same.

He averred that it is the law that when a person occupies land for more than twelve (12) years without disturbances he automatically acquires the lawful title of that land. That he has occupied the disputed land since 1970 and developed the same up to 2015 when the respondents appeared and claimed to be the lawful owners.

To cement his argument, the appellant referred to the case of **Shabani Vs. Rajabu Simba (1967) HCD 233** where the court held in favour of the respondent under adverse possession.

The appellant further submitted that in law a person whose evidence is heavier than that of the other is the one who must win. He therefore prayed to this court to allow the appeal with costs.

In reply Mr. Kusalika Counsel for the respondents submitted that the evidence adduced by witnesses of the respondent in the trail tribunal clearly shows that the appellant was given land measuring 16X35 meter in size for residence and not a vacant land measuring 16X35 in size as alleged by the appellant. Thus the doctrine of adverse possession does not fall in respect of the facts of this case as there is no trespass to the vacant land measuring 16X35 meters in size. He therefore prayed to this court to dismiss the appeal for want of merits.

Having considered the rival submissions of both parties, I will now determine the grounds of appeal in seriatim.

On the 1st ground of appeal, the appellant alleged that the Hon. Chairman erred in law to decide in favour of the respondents without regarding the issue of adverse possession as the appellant used the land in dispute since 1970.

It is in court record that the appellant was given the land in dispute by the respondents' father since on 1970. This fact was not disputed by the respondents.

In their testimonies at the trial Tribunal, both the respondents admitted that their late father gave the appellant the land measuring 16X35. What is in dispute as alleged by the respondent is that the area in which the appellant claims to be his, is not part of the land which he was given by their late father.

The appellant being the one who sued the respondents for trespass, invited two witnesses. Both of them confirmed that the appellant was living in the suit premises since on 1970 after he was given the disputed land by the respondents' late father. All of them admitted that they saw the appellant cultivating permanent crops in the disputed land since then.

The respondents on the other hand admitted that their late father gave the appellant an area for residence, but that land is different from the one which they sold to the other party.

On 16/12/2015 the trial Ward Tribunal visited the locus in quo so as to get a clear picture on what was in dispute. At the locus in quo the trial Ward Tribunal asked the neighbours namely Iska Mpalange and Machekela Machekela about the ownership of the land in dispute. They both confirmed that the appellant was living in the disputed land since 1970 after he was given the same by the late Malenda (the respondents' father).

Upon considering the evidence of both parties, I find that the appellant is covered by the principle of adverse possession. Adopting the principle of adverse possession, I had the advantage of reading the Book titled "**The Customary Land Law of Tanzania, a Source Book by W. James and G. M. Fimbo, on the Acquisition of Title by long possession**. The learned authors state at page 533:-

"Received law permits a person to acquire an interest in property by long uninterrupted possession and user..."

The learned authors quote the judgment in the case **of Stephen s/o Sokoni versus Millioni Sokoni (1967) C. A. No. D/183/1963** wherein the court recognized the doctrine of long possession by stating at page 539 that:-

"Alternatively it could be argued that the respondent has occupied the shamba for such a long time that it would be unreasonable and unfair to allow the appellant to disturb him at this time. If the appellant had really required the shamba he could not have kept quiet for more than 30 years."

At page 543 of the book, the learned authors refer to the case of **Bi Juliana Rwakatare Versus Kaganda (1965) L. C. C. A 43/1963** in which Saidi, J. as he then was observed:-

"All these years it appears from the evidence, the respondent did not require the land at all, it is not clear as to why he wants it now, With so many years of

occupation....It would be grossly unfair after a long time to disturb the appellant....The land is declared to be the property of the appellant by virtue of long occupation of 28 years."

The above principal was also fortified in the case of **Nassoro Uhadi Vs. Mussa Karunge** High Court of Tanzania at Dar Es salaam Registry in Civil Appeal No.17 of 1977 where it was held that:-

"Where a person occupies another's land over a long period and develops it, and the owner knowingly acquiesces such a person acquires ownership by adverse possession".

Considering the principle of adverse possession as explained above, it is in evidence that the appellant was in occupation of the suit land since 1970. The fact which was not disputed by the respondents. That being the case, I find that it was proper for the trial Ward Tribunal to hold that the appellant is the lawful owner of the suit premise as he has been in occupation of the disputed

land for more than 35 years without being disturbed. Hence it will be unfair to allow the respondents to disturb him now.

It is worth noting that since the appellant was given the disputed piece of land while the respondents' father was alive then it cannot be part of the land to be administered by the heirs. That land could not be treated as part of the estate of the late Malenda as found by District Land and Housing Tribunal.

On the 2nd ground of appeal the appellant alleged that the trial Tribunal erred in law and fact for failure to take into account that the appellant has planted permanents crops and the respondents trespassed into land in dispute and sell without prior consent of the appellant.

According to the evidence on record, the respondents admitted in their testimonies that they sold the disputed land so as to get money for treatment of their sibling who was sick.

It is my belief that since the appellant was the lawful owner of the disputed land, the respondents should have consulted him

for his consent before selling the disputed land. The respondents had no authority in law to sell land which they did not own.

It is a settled principle of law that, a person without a good title to goods cannot pass a good title to the transferee than his own. This is supported by the ancient maxim

> **"*Nemodat Quod non-habet*"** which means that *"No one can transfer a better title than he himself has."*

The law clearly provides that in order for the buyer to acquire better title there must be an authorization from the real owner. Thus it was wrong for the respondents to sell the appellant's land, the cause of this dispute without his consent. This ground of appeal is allowed.

With regard to the 3rd ground of appeal, having carefully gone through the evidence on record, I believe the first appellate court erred in law by disregarding the credibility of evidence of the appellant which was adduced at the trial Tribunal. This is because the appeal at hand is heavily based on the weight of evidence. Thus it is the trial court which is better placed to assess

the credibility of witnesses and evaluation of the evidence adduced.

This principle was enunciated in a number of decision including **Ali Abdallah Rajabu V. Saada Abdallah Rajabu and Others** [1994] TLR 132 and **Omar Ahmed V. R** [1983] TLR 52, to mention a few.

In the case of **Ali Abdallah Rajab V. Saada Abdallah Rajabu and Others** (supra) it was held that:

> *"Where the decision of a court is wholly based on the credibility of the witnesses, then it is the trial court which is better placed to assess, their credibility than an appellate court which merely reads the transcripts of the record".*

In the case of **Omar Ahmed v. R** (supra) it was held:

> *"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on the record which call for a reassessment of their credibility".*

Further to that the trial ward tribunal had the opportunity to visit the locus in quo. It goes without saying that the tribunal rightly

held as it did. Thus it was wrong for the first appellate court which only reads the transcripts of the record to access the credibility of the appellant's witnesses. Hence this ground of appeal is also allowed.

In the circumstances, I quash the decision and Orders made therein by the District Land and Housing Tribunal in Land Appeal No. 41 of 2016 and uphold the decision of the trial Ward Tribunal No. 35 of 2015.

The appeal is allowed in its entirely with costs.

S.A.N.WAMBURA
JUDGE
11.05.2018