**IN THE HIGH COURT OF TANZANIA**

**[LAND DIVISION]**

**AT SUMBAWANGA**

**LAND APPEAL NO. 12 OF 2020**

**(From the Decision of the District Land and Housing Tribunal of Rukwa District at Sumbawanga in Land Case No. 30 of 2017)**

**STIVIN S/O TANGANYIKA**
**SILVERY S/O TANGANYIKA** } **.....APPELLANTS**

**VERSUS**

**EDWARD ABEL MAUTO ..... .....RESPONDENT**

**JUDGEMENT**

**02nd July – 10th August, 2020**

**MRANGO, J.**

This is an appeal against the judgement and decree of the District Land and Housing Tribunal for Rukwa (henceforth the trial tribunal) in the application No. 30 of 2017 which was delivered on 17. 01. 2020. The appellants herein were sued by the respondent herein at the trial tribunal over the ownership of the disputed land. The respondent was declared the rightful owner of the disputed land by the trial tribunal.

Aggrieved by the trial tribunal decision, the appellants have preferred this appeal by lodging the following grounds of appeal;

1. That the learned Chairperson of the District Land and Housing tribunal erred in law and fact by not considering that the appellants owned the land for the period of over 50 years as the same were borne over that plot.

2. That the learned Chairperson of the District Land and Housing tribunal erred in law and fact by not considering that the one Edward Abel Mauto had not only *locus stand* to institute the case but also capacity as the same has no letter of appointment as the administrator of the estate.

3. That the learned Chairperson of the trial tribunal erred in law and fact by not evaluating the evidence of Gerard Kupelelwa, Nestory Mtui, who are close neighbours of the plot in disputes who strongly narrated that the disputed plots belong to the appellant.

4. That the trial Chairperson misdirected herself in law and fact by not considering that the respondent evidence was very weak and was not proved beyond the balance of probability as required by law.

5. That the learned Chairperson made a serious misdirection of law by not considering probate issues over the plot.

6. That the learned Chairperson of the District Land and Housing tribunal erred in law and fact by failing completely to evaluate the evidence of the appellants which indicate from the time the respondent to be trespassed over our plot.

7. That the learned Chairperson made a serious misdirection of law by not considering permanent crops such as trees of types of eucalyptus (mikaratusi) and many sisals which our late father planted over the disputed plot.

8. That the Chairperson of the District Land and Housing tribunal erred in law and fact by not considering the time of recovery of land.

9. That the Chairperson of the District Land and Housing tribunal erred in law and fact by not considering the essence that the respondent had never complained, or no any interference of the land, anywhere over the plot for more than fifty years rather than 2017 when he wanted to sell the plot and hence land application No. 30/ 2017.

10. That the District Land and Housing tribunal did not move and see the scenery of the disputed land.

11. That we are not fully treated as according to principles of natural justice.

As this appeal was called on for hearing, the appellants were represented by Mr. James Lubus – learned advocate, whilst the respondent had a legal service of Mr. Peter Kamyalile – learned advocate. Mr. James Lubus prayed to argue the appeal by way of written submission whereas

Mr. Peter Kamyalile conceded. This court set a date for each party to file submission, therefore each filed respective submission as scheduled.

Arguing in support of his appeal, Mr. James Lubus – learned advocate for the appellants submitted that he wished to merge and to argue ground 1, 8 and 9 altogether and hence he abandoned ground 10 of the appeal.

Learned advocate Lubus submitted that the appellants were in occupation of the suit land for a long time as they were born and grew to find their parents are in occupation of such land without interference from the respondent. Mr. Lubus cited the case of **Nassoro vs. Rajabu Simba [1967] HCD No. 233** of which the decision entitled a person to ownership of land after a long undisturbed occupation of the same. Mr. Lubus argued that the principle of adverse possession was explained in the case of **Augusta Mpolo versus Ramadhan Shaban Msuya, Misc. Land Appeal No. 98 of 2017** where Judge Mgonya quashed the decision made therein of the District Land and Housing tribunal in Land Appeal No. 46/ 2016 and upheld the decision of the Trial Ward Tribunal of Kanga in application No. 43 of 2011.

Mr. Lubus submitted that it was not proper for the trial tribunal to hold that the respondent is the lawful owner of the suit land while the appellants have been in occupation of the disputed land for more than 50 years as the first appellant is 52 years old and the second is 50 years old and all the time have continued cultivating the land to date without being disturbed, thus for his view it was grossly unfair for the trial tribunal to grant the respondent the right over the plot which disturbed the appellants.

With regard the second and fifth grounds of appeal, Mr. Lubus submitted that there was no evidence on record which shows that the respondent was ever appointed as administrator of the estate and that he redeemed the land belonging to the late Abel Tanganyika Mauto and distributed it to his heirs.

Mr. Lubus further submitted that if he could make a diligent perusal he will find that there is no any document which complies with **section 44 of the Probate and Administration of Estates Act, Cap 352**. He argued that though it is a matter of academic on distinction between power

of attorney and letter of appointment of administrator of the deceased estate.

He submitted further that the respondent lacked *locus stand* to prosecute the case at the District Land and Housing tribunal. He insisted that the respondent ought to have followed the normal procedure for appointment to be administrator of deceased estate which would give him *locus stand*. He cited the case of **Victoria Daud Chanila versus Doroth Biseko Mazula, Land Appeal No. 9 of 2015** and the case of **Nyaryanga Nyamarasa versus Nyakaho Nyamarasa Masiko, Land Appeal No. 18/ 2020** where it was held that the suit against him may be instituted through the administrator of the estate of deceased person.

Submitting in respect of ground 3, 4, 6 and 9 altogether Mr. Lubus argued that Hon. Chairperson diverted the right of the appellants by citing irrelevant cases. He further submitted that the evidence of the respondent and his witness was not sufficient enough to controvert the appellant's evidence and Hon. Chairperson was wrong to uphold the position that the suit land is the property of the respondent.

Mr. Lubus submitted that the neighbours of the appellants testified that the appellants had been in occupation of the land for a long time that correspond to the evidence of the appellants. He cited the case of **Juliana Rwakatare versus Kaganda [1965] L.C.C.A 43/1963** where Said, J observed that;

> "All these years it appear from the evidence, the respondent did not acquire at all, it is no 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 living occupation of 28 years."

Mr. Lubus cited the case of **Stephen Sokoni versus Millioni Sokoni [1967] C.A No. D/183/1963** where it was stated that;

> "Alternatively, it could be argued that 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."

Finally, Mr. Lubus prayed for the court to allow the appeal with costs and quash the decision of the trial tribunal and the appellant be declared the owner of the suit land.

In reply to ground one, eight and nine of the appeal, Mr. Peter Kamyalile, learned advocate submitted that the evidence is very clear that the appellants were borrowed the disputed land by the father of the respondent on 2008 up to 2015 when the dispute emerged. It is not true that the appellants have been in occupation of the disputed land for more than 50 years. The first appellant when crossed examined he testified that his father passed away on 1980 when he was 10 years old and the second appellant when cross examined he testified that his father passed away on 1980 when he was 8 years old, that means all were born on 1970 and 1972 respectively. He said when he counts 52 years from 2020 he gets 1968 for the first appellant and when he counts 50 years from 2020 he gets 1970 for the second appellant, thus they have not owned the disputed land for more than fifty years since they were not yet born.

Mr. Kamyalile argued that since the appellants were invitee to the disputed land since 2008 they cannot exclude their host whatever the length of their occupation. Also the principle of adverse possession does not apply in this case as laid in the cases of **Samson Mwambene versus Edson James Mwanyingili [2001] TLR 1, Makofia Merianangа versus Asha Ndisia [1969] HCD No. 204** and **Swalehe versus Salim [1972] HCD No. 140.**

He submitted that the issue of *locus stand* does not hold water because the case was filed on 2017, when the father of the respondent was still alive. Since he died on 2018. The respondent was given the special power of attorney to prosecute such case. Such ground could hold water if at the time of filing the case the respondent father was already passed away.

With regard ground three, four, six and nine of the appeal, Mr. Kamyalile submitted that the evidence of the respondent was very strong and hold water to prove the ownership of the disputed land. The fact that father of the respondent borrowed the appellants he did not lose his ownership, but he retained ownership over it and had a right to get it back

for his own use. He said the cases cited are distinguishable to this case hence irrelevant. The decision of the trial tribunal was properly reached since the evidence of respondent was heavier than that of appellants as it was held in the case of **Hemed Said versus Mohamed Mbilu [1984] TLR 113 (HC);**

> "According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."

With regard to ground 7 & 11 of appeal, Mr. Kamyalile submitted that since the appellants have remained silence with them on their submission, he invited the court to take it that the appellants have abandoned them.

Finally, he submitted that based on the submission above and the plethora of relevant authorities pined in, he prayed for the appeal be dismissed with cost.

Having considered the rival arguments and submissions of both sides the issue for determination is whether the appeal has merit.

This court being the first appellate court to this matter at hand, I have carefully gone through the entire records of the trial tribunal and both

the petition for appeal and the reply thereto, and submissions of both sides whereby I find it worth to discuss my findings as follows.

The law of evidence is settled that the standard of proof is on the balance of probabilities. However, for both parties, whoever desires any court to give judgment as to any legal right or liability dependent on the 'existence' of facts which he asserts, 'must prove' those facts to exist **see 110 and 111 of the Law of Evidence Act, 1967, Cap. 6 of the R.E. 2002.**

At the trial tribunal, the respondent herein was the applicant suing the appellants herein, claiming legal possession of the land in dispute. During the trial, the respondent (PW1) testified that in a year 2008 the appellants approached his father namely Abel Tanganyika and asked for the land in dispute temporarily for farming as their land was no longer fertile for that time, hence his father also a uncle for the appellants allowed them to use the land in dispute for a while so as to earn money which could enable them to buy fertilisers for their unfertile land. It was his testimony that in a year 2015 he requested the appellant to vacate from the land in dispute after being satisfied that the appellant had earned enough money, however he said the appellants maintained that such land

in dispute was their property. PW1 informed the trial tribunal that the appellants' land is adjacent to the land in dispute and his father passed away in July 2018 after the dispute of which emerged in 2015.

PW1's witness, one Ottu Garimoshi (PW2) testified that his father and one mauto had land adjacent to each other and that they were cultivating their land together. He said Mauto left his land in dispute to his sibling Elias Tanganyika who used such land for two years before he died. He further said the appellants began using the land in dispute and informed the trial tribunal that Mzee Mauto had used such land in dispute for a long period of time before borrowing the same to the appellants' father.

On their part, the appellants, DW1 and DW2 before the trial tribunal they testified that they were born at Ndalambo and found their parents using the land in dispute. DW1 informed the trial tribunal that his father died in a year 1980 while was at the age of 10 years, while DW2 said he was at the age of 8 years. The appellants insisted at the trial tribunal that the land in dispute belongs to their late father.

The appellants' witness, DW3 said he had never seen the respondent on the land in dispute. While witness DW4 said he had a land adjacent to the land in dispute and he had never seen the applicant or his father on

the land in dispute, however he admitted at the trial tribunal that Abel Mauto who was father of the respondent once lived on the land in dispute.

On the balance of probability, the evidence as testified on the side of the respondent herein to my view was credible enough as compared to the evidence as adduced by the appellant's side. The appellant's witness one Nestory Mtuhi (DW4) made a contradictory testimony which made this court not to believe the entire evidence of the appellants. DW4 in cross examination said that he know Abel Mauto, father of the respondent who lived on the land in dispute contrary to his earlier statement during examination in chief of which he said Abel Mauto nor the respondent never lived on the land in dispute.

It is also a settled law that the trial court or tribunal is better placed to assess the witness's credibility. For that matter, the appellate court will only interfere if there is a misdirection or non-direction. (**See DPP v. Jaffer Mfaume Kawawa [1981] TLR 149;** and also **Salum Mhando v. Republic, [1993] TLR 170**). For that fact, I agree with the findings of the trial tribunal that the respondent father had borrowed the land in dispute to the appellants who were his relatives for temporary use as

evidenced by the testimonies of the respondent and his witness. This finding may as well dispose of the 3, 4, 6, 9 grounds of appeal.

Addressing the ground that the appellants have been in occupation of the land in dispute for many years does not hold water in law where there is ample evidence as of this appeal to show that the appellants were mere invitee to such land as rightly argued by the learned advocate for the respondent. It is a principle of law that a mere invitee whatever the length of his/her occupation can exclude his/ her host.

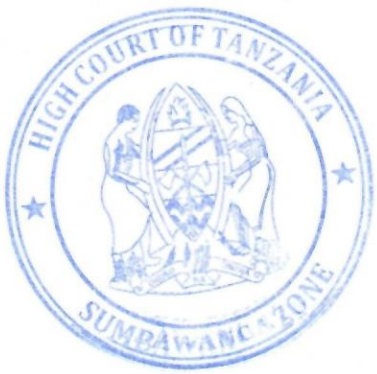
Another issue for consideration is the issue of *locus stand* as raised by the learned advocate for the appellants. My scrutiny of the exhibit special power of attorney, one Abel Tanganyika Mauto granted special power to one Edward Abel Mauto, the respondent herein in respect of all his properties and the same was granted on 2 day of March 2016. The trial tribunal record shows that the donor died in a year 2018 the fact which was never disputed by the appellants and the application No. 30 of 2017 was filed on 13. 07. 2017, therefore the issue of *locus stand* does not stand in this appeal.

I concede the argument by the learned advocate for the respondent that ground 7 and 11 have been abandoned by the learned advocate for

the appellants for his failure to address the same while ground 10 was voluntarily abandoned.

In view of the foregoing discussion, I find this appeal is without merit. With respect, the same is dismissed with costs and the decision and decree of the trial tribunal are confirmed.

It is so ordered.




**D. E. MRANGO**

**JUDGE**

**10.08.2020**

Date - 10.08.2020

Coram - Hon. D.E. Mrango – J.

1st Appellant, 2nd Appellant } Both present & represented by Mr. James Lubus – Adv.

Respondent - Present in person

B/C - Mr. A.K. Sichilima – SRMA

**COURT**: Typed Judgment delivered today the 10th day of August, 2020 in presence of both the parties in persons and in presence of Mr. James Lubus – Learned Advocate for the Appellants.

Right of appeal explained.

HIGH COURT OF TANZANIA SUMBAWANGA ZONE

**D.E. MRANGO**

**JUDGE**

**10.08.2020**