IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.154 OF 2018

(Arising from Land Application No.49/2012, Judgment delivered by Hon. Chairperson R.I. Rugarabamu at Kilombero /Ulanga District)

THE REGISTERED TRUSTEES

OF MASJID MKONGWE.....APPELLANT

VERSUS

ATHUMANI NYUMBANIKI.....1ST RESPONDENT

CELESTINE NJALAMOTO.....2NDRESPONDENT

S. MAKUNYOMA.....3RD RESPONDENT

MOHAMED KALYASA.....4TH RESPONDENT

MAVUMBI NJALAMOTO.....5TH RESPONDENT

BINTI KADWELA.....6THRESPONDENT

JUDGEMENT

OPIYO, J.

The parties here in above have locked horns over a piece of land, measuring 40 x 80 square meters, located at Sofi Majiji Village, in Malinyi District, Morogoro Region. The appellant claims to be the rightful owner of the said land which has a mosque which was built since 1935. The respondents

jointly disputed the appellant's claims over the suit land. They maintained that the said land belonged to their families since 1930's.

To resolve their dispute over the suit property, the appellant lodged a complaint at the Kilombero /Ulanga District Land and Housing tribunal (herein after referred as the trial tribunal), vide Land Application No.49/2012, against the respondents for trespassing on the suit property which was decided in favour of the respondents. Against this background, the appellant has lodged this appeal challenging the whole decision of the trial tribunal based on 10 grounds as follows:-

1. That, Hon. Chairman of the Kilombero/Ulanga District Tribunal erred in law and facts by delivering a judgment and grant the disputed land as a clan land of Lugubi.

2. That, the Honourable Chairperson did erred in law and fact by holding that the respondents did own the disputed land through inheritance without any justification and clear evidence from another witness to support their testimony.

3. That, the Honourable Chairperson erred in land facts by holding that the disputed land belong to the Lugubi family while the respondents are not related to the said family.

4. That, the Honourable Chairperson erred in law and fact holding that the disputed land belong to the Lugubi family while ignoring the evidence that Mosque was built on the said land since 1935, disregarding the principle adverse possession.

5. That, the Honourable Chairperson did erred in law and facts by the proceeding with hearing the application and delivery of the judgment knowing that some of the respondents passed away during the case hearing.

6. That, the Honourable chairperson erred in law and fact by his failure to evaluate the evidence adduced and conclude that the disputed land belong to the Lugubi family while the appellant claimed 40x80 M for the Mosque.

7. That the Honourable Chairperson erred in law and fact by disregarding the act of the 4th respondent to quit and handover, land of the applicant to the owner before his death.

8. That, the Honourable Chairperson erred in law and fact by not considering that the disputed land was the Mosque land from 1935 which cannot be inherited by anyone as it was for community activities.

9. That, the Honourable Chairperson erred in law and fact by failure to evaluate evidence for part of respondents and rely on them without taking consideration of other respondents and also without excluding them on his judgment.

10. That the Honourable Chairperson erred in law and fact by considering that the disputed land was Lugubi's family and the respondents inherited the same without any single documentary evidence adduced before the tribunal of how they came to inherit the said land.

The appeal was heard by written submissions, Ubaidi G. Hamidu, learned counsel appeared for the appellant while the respondents enjoyed the legal services of Advocate Dickson Sanga.

Mr. Hamidu, appellant's counsel, consolidated grounds 3, 4, 5 and 12 in his submission in support of the appeal. He also consolidated grounds number 8, 10, and 11. Grounds number 1, 2, and 7 were neither argued nor expressly abandoned by the appellant's Advocate, and without much further ado, I dismiss them accordingly for not being prosecuted. It was submitted by Mr. Hamidu on the 3rd, 4th, 5th and 12th ground of appeal that, the trial Chairperson erred in law by adjudicating the suit without taking into consideration of the revision order from this court given in Land Revision No. 57 of 2009. Furthermore, that, the disputed land as to the decision of the trial tribunal was granted to the Lugubi's family without any evidence from the respondents to prove that save for their testimonies (DWI, DW2, DW3) which admitted that the disputed land belonged to their grandfather and on the said land a mosque was built. It is from their testimonies; we found clear evidence that the disputed land was owned by the appellant grandfather, who then built the mosque since 1935, there was no evidence to prove the respondents are the heirs of the suit land as the same is the legal process which can be proved not only by oral evidence, but also by documentary evidence.

As for the 6th ground Hamidu submitted that, the trial chairperson erred in law and fact when he held that the disputed land belongs to Lugubi family while ignoring the evidence that Mosque was built on the said land since

1935, consequentlyu disregarding the principle of adverse possession. He contended that, the trial chairperson ignored the fact that, 12 years have lapsed since the mosque was built on the suit land, thereby creating an adverse right of possession to the appellant as against the respondents. It was decided in the case of **MATHIAS KATONYA V. NDOLA MASIMBI (1999) TLR 390** that:-

> *"As the land was held under customary law the limitation period for its recovery was twelve years and the suit was time barred."*

He also cited the case of **THOMAS MATONDANE VS DIDAS MAWAKALILE & 3 OTHERS (1989) TLR 210** where it was held that :-

> *"The Appellant acquired a title to the piece of land after the expiry of the 12 years during which he was uninterrupted possession thereof"*
>
> *"It was contrary to the principle of justice to deprive the appellant of the piece of land which he had long possessed without giving him hearing."*

He thus argued that, since the appellant had possessed the suit land for about 80 years without interruption, these authorities gave them right of ownership of the suit land.

On the 9th ground of appeal, he submitted that, the Chairperson delivered his decision while the 4th respondent has already trespassed and asked for forgiveness to the Muslims, not only that he delivered his decision while the

same respondent had already passed away. To the appellant's counsel that was a mistake that affected the appellant's rights over the suit land.

Advocate Dikson Sanga reply to the submissions by the appellant's counsel was to the effect that, the Appellant contention on the 1st ground of appeal that the trial tribunal did not consider the order of the High Court in Land case revision No. 57 of 2009 which ordered trial de novo of Land Case No. 09 of 2009 before another chairperson at the District Land and Housing Tribunal for Kilombero/Ulanga District at Ifakara is a misconception and baseless. The Appellant counsel went further to attach the Land Case Revision No. 57 of 2009 in his submission in trying to convince this court. Mr. Sanga maintained that, this appeal emanates from Land Case No. 49 of 2012 and the said order of the High Court was all about Land Case No. 09 of 2009. In other words, there was no any order of the High Court that Land Case No. 49 of 2012 should be re-tried by another chairperson as submitted by the appellant's counsel. He maintained that, considering this fact will amount to allowing new evidence to be admitted at the appeal stage. This is contrary to the decision of court in **Ismail Rashi v Mariam Msati, Civil Appeal NO. 75 OF 2015, Court of Appeal of Tanzania, at Dar Es Salaam, (unreported),** where it was held that:-

> *"In the Premises, we are satisfied that the judge had no justification to look and act upon additional evidence at the hearing of the first appeal because: One; the certificate of the title was not produced in evidence during trial and rejected so as to necessitate its re-admission on appeal under Order XXXIX, Rule 27(1) of the CPC; Two; it was not established during trial that the documentary evidence could not have been obtained with reasonable diligence for use at the trial."*

Mr. Sanga argued further that, it is on record that, the trial tribunal heard the matter inter parties after setting aside *ex parte* judgment. It is also on record that, the Respondents filed application for setting aside *ex parte* judgment and the same was heard by both parties.

Mr. Sanga went on to submit that, in civil matters, for a party to win the case he or she must have heavier evidence than the other. The respondents' evidence at the trial tribunal was heavier than that of the appellant; hence they won the case at the trial tribunal as per the decision in **Hemed Said v Mohamed Mbilu (1984) TL R 113.**

Mr. Sanga further maintained that the appellant was the one who knocked the door to be declared the lawful owner of the plot in dispute at the trial tribunal, so whether the respondent proved or not does not whatsoever make the appellant the lawful owner of the suit land. It was upon the appellant to prove that, she failed to do so. The principle is clear that, who alleges must prove as provided under section 110(1) (2) of the Law of Evidence Act, Cap 6 is to that effect. Therefore, grounds 1-5 should not be allowed for being baseless.

As for the 6th ground of appeal, Mr. Sanga contended that, the issue of the adverse possession was not raised at all and it is nowhere featured in the trial tribunal proceedings. It has been raised at this stage for the first time, something which is contrary to the principles of law. He argued that, anyhow, the adverse possession rule cannot work in favour of the appellant, as she came into existence on 06th December, 2013, thus it is not true that

it has been in possession of the suit premise from 1930's. Mr. Sanga stated that, for one to establish adverse possession, he must be able to prove that he was in possession for the whole period of 12 years uninterrupted, but in the present circumstances, the Appellant came into existence in 2013 as such the Appellant has never possessed the suit premise for 12 years as required by law.

On the 9th ground of appeal it was the submission of Mr. Sanga that the death of 4th respondent as raised by the appellant has nothing to do with the appellant, it is also new fact raised by the appellant as it was not raised at the trial tribunal. Furthermore, it is upon the administrator of the deceased estate, if any, who is responsible with protection of the interests of the deceased and not the appellant. He prayed the appeal be dismissed with costs.

In rejoinder Mr. Hamidu for the appellant added that, it is undisputed fact that, the Mosque in the disputed land was built in 1935. Whether the disputed piece of land was given to the Muslim for their worships, but from then they remain uninterrupted by anyone, until, the Respondents on 2009 when the first application was filed in the tribunal. He argued that, the registration made on 2013 does not mean the disputed land also was not in existence, but it was there for about 80 years uninterrupted. For the reason thereof the applicant is entitled to the ownership of the said land based on the principle of adverse possession.

Having seriously scrutinized the submissions of both parties as well as the records of the trial tribunal, my conclusion as far as the instant appeal is

concerned is straight forward that the same is baseless and worth of dismissal. I have been moved to decide so based on the reason that the appellant did not submit on the grounds of appeal as contained in his petition of appeal, instead, she has come up with new grounds completely different from that contained in the petition of appeal, save for the 9th ground which appears to be the 5th ground in the petition of appeal. The act of the appellant's counsel to submit on new grounds has attracted new issues as well as new evidence as argued by the respondents' counsel in his submission (**see Ismail Rashi Versus Mariam Msati (unreported), (supra).**

It is a trite law that parties to a case are bound by their pleadings. At the appeal stage, the appellant is not allowed to introduce new grounds of appeal during submissions. To do so is to bring non-existence issues of which neither the court nor the respondent is aware of. In a Nigerian case of **Mojeed Saura Yusufu versus Madam Idiatu Adegoke** which was quoted in approval by honourable Mwambegele J (as he then was) in **YARA Tanzania Investment Limited versus Charles Msemwa and 2 others; Commercial case no. 5 of 2015, high court commercial Division, at Dar Es Salaam, (unreported),** it was observed that,...

> *".....it is a now a very trite principle of law that parties are bound by their 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 varience with the averments of the pleadings goes to no issue and must be disregarded by the court"*

Based on the above quoted decision, this court will pay no attention on the submissions of the appellant's advocate save for the submissions on the 9th ground. That being the case, grounds 1, 2,3,4,6,7,8,9, and 10 are marked dismissed for not being prosecuted.

As for the 5th ground which was termed as the 9th ground on the submissions by the appellant's advocate, it was contended that, the trial tribunal erred in law and facts for hearing the application and delivering judgment while aware of the death of the 4th respondent. I find this ground to be baseless. What I have on records, when the judgment was delivered is that on 1st of October 2018, all the parties were marked present as shown at page 44 of the typed proceedings of the trial tribunal. Therefore, I will not labor much on it, as it is more of a speculation than a fact, there being no proof of death and when it occurred.

In the end, this appeal is dismissed entirely for lack of merit with costs. The judgment and decree of the trial tribunal of Kilombero are hereby upheld.

M. P. OPIYO,

JUDGE

10/12/2020