

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**LAND APPEAL NO. 30 OF 2021**

**ALFRED PETER KAPENGA ..... APPELLANT**

**VERSUS**

**PHILLIP KALYELYE ..... RESPONDENT**

(Appeal from the Judgment and Decree of the District Land and Housing tribunal Land

for Mpanda at Mpanda),

(G. K. Rugalema, Chairperson)

Dated 16<sup>th</sup> Day of November, 2021

In

Land Application No. 3 of 2021

**JUDGMENT**

Date: 20/05 & 21/07/2022

**NKWABI, J.:**

The trial tribunal decided in favour of the respondent. The appellant instituted the land application claiming for a piece of land which has a size of ten acres valued at T.shs 5,000,000/= . The piece of land is located within Mpanda Municipality. It was the claim of the appellant that he purchased the piece of land from the respondent in the year 1993. Since then, he has been cultivating it until the year 2020. He prayed for declaration that the suit land is his property, vacant possession, costs of the application and any other reliefs the court may deem fit to grant. The trial tribunal found that the

appellant had failed to prove his claim. It dismissed the application and declared the respondent the owner of the disputed piece of land. Aggrieved with the decision of the trial tribunal, the appellant lodged with this Court a memorandum of appeal comprising four grounds of appeal. I prefer to list the grounds of appeal as follows:

1. That, the Trial Tribunal grossly erred in law by failing to understand and working upon the opinion of assessors who opined that the Appellant is the lawfully owner of the disputed land and even failed vividly to explain why he differs with their opinions.
2. That, the Trial Tribunal grossly erred in law by not considering the evidence adduced by the Appellant and his witness that he purchased the disputed land since 1993 via oral contract that is why was not interrupted by the Respondent for using the land for more than 28 years.
3. That, the Trial Tribunal grossly erred in law by declaring that there was no proper procedures followed by the Appellant to purchase a disputed land by citing unauthoritative provisions of the law and case law to resolve the dispute.

4. That, the Trial Tribunal grossly erred in law by pronouncing a judgment without giving justifiable reasons as the law requires.

Then the appellant prayed for the following reliefs. The decision of the Trial Tribunal be quashed and set aside. Declaration that the Appellant is the rightfully owner of the disputed land. Vacant possession. Costs of the case and any other reliefs this Court deems fit and just to grant.

When the matter was called up for hearing, the appellant appeared in person unrepresented. The respondent was represented by Mr. James Lubus, learned advocate.

In his very brief submission, the Appellant contended that they did not reduce the transactions into writing. The witnesses of the transactions are dead. He insisted that he proved the case for using the land for 27 without disturbance. He then adopted his grounds of appeal as his submissions.

On the side of the respondent Mr. Lubus, strongly opposed the appeal and submitted that there was no any violation of the law. He pointed out that

there were assessor opinions. The 1<sup>st</sup> ground of appeal be dismissed, he stressed.

On the 2<sup>nd</sup> and 3<sup>rd</sup> grounds which Mr. Lubus argued together, he maintained that there was no any law that was violated. He further asserted that the appellant failed to prove on how he acquired the land for lack of documentary evidence. He argued section 60 of the Land Act requires that every sale transaction in respect of land ought to be reduced into writing. Its proof therefore ought to be into writing. He cited **Ramadhan Makwega V. Theresia Mshaza**, Misc. Land Case No. 3/2018 High Court of Tanzania at page 3 to fortify his argument that since the appellant had no documentary evidence, then he was merely an invite.

With regard to the 4<sup>th</sup> ground of appeal, Mr. Lubusi disputed it on the ground that the chairman gave reasons for his decisions. He therefore, prayed the appeal be dismissed. He also asked this court to uphold the decision of the District Land and Housing Tribunal with costs.

The Appellant had few words in rejoinder submission, his was insistent on his grounds of appeal.

I have given this appeal a deserving consideration. I have carefully examined the arguments of both sides and the record. I am of a firm view that this appeal is merited. All grounds of appeal have merit. In the situation I find that the appellant proved his case on balance of probabilities because how come one to come to claim for a shamba after all those years if he had really invited the appellant for use of the land? What evidence, e.g. documentary evidence to prove that the respondent invited the appellant to use the land. If the law were as Mr. Lubus tries to impress upon this court, then all those who own land without documentations will have their rights in jeopardy.

The appellant's evidence is clear that he bought the land from the respondent and his long use of the land without the respondent maintaining that it was his property is supported by the evidence of PW2 and PW3 while the evidence of the respondent is gravely contradicted by his witness who said the respondent was using the land until 2007 while the respondent himself claimed that the appellant was using it on invitational terms. This

discussion and finding of mine justify the 2<sup>nd</sup> ground of appeal. The provisions of section 60 of the Land Act or the provisions of the Village Land Act are inapplicable in this case because those are provisions of substantive laws which do not act retrospectively as the appellant bought the piece of land prior to enactment of such laws. Even the case of **Priskila Mwainunu v. Magongo Justis**, Land Appeal No. 9 of 2020 (HC) (unreported) applied by the learned Chairman in his decision is distinguishable with the case at hand as in that case the land was bought on 24<sup>th</sup> September, 2011 well after the Land Act and Village Land Act had come into force while that is not the position in this case.

While, PW2 and PW3 corroborated the evidence of the appellant to the effect that he was using the land since the year 1993, so, bringing the alleged adverse possession claim on the appellant is like putting words in the mouth of the appellant. In the circumstances the case of **Ramadhan Makwega V. Theresia Mshaza**, Misc. Land Case No. 3/2018 is distinguishable and inapplicable in this case just as the 3<sup>rd</sup> ground of appeal of the appellant which I approve.

Mr. Lubus too wants to impress upon me that the case on the respondent's side is free from blemish in the sense that he landed a strong defence against the appellant's case. I do not accept the suggestion. This is because the respondent did not cross-examine the appellant on the appellant's strong evidence that the appellant bought the piece of land from the respondent. Failure to cross-examine one is taken to have admitted the such facts. My approach is supported by **Rashidi Sarufu v. Republic**, Criminal Appeal No. 467 of 2019 where it was stated:

*"As a matter of principle, a party who fail to cross examine a witness on a certain matter is deemed to have accepted the matter and will be estopped from asking the trial court to disbelieve what the witness said."*

I therefore accept and find merit in the 1<sup>st</sup> ground of appeal by the appellant that, the Trial Tribunal grossly erred in law by failing to understand and working upon the opinion of assessors who opined that the Appellant is the lawfully owner of the disputed land and even failed vividly to explain why he differs with their opinions. I accept the argument of Mr. Lubus that the learned Chairman had reasons, but the reasons are not acceptable or

irrational. As such I join hands with the opinion of tribunal assessors that the appellant had proved his case on balance of probabilities that the piece of land in dispute is his property.

With regard to the 4<sup>th</sup> ground of appeal, Mr. Lubusi disputed it on the ground that the chairman gave reasons for his decisions. As said above, I agree that the learned District Land and Housing Tribunal Chairman gave reasons, but his reasons are irrational, so they cannot be supported by this Court

For the above reasons, I quash the judgment and set aside the decree and orders of the District Land and Housing Tribunal. I declare that the appellant is the lawful owner of the disputed land. I also order for vacant possession

In fine, the appeal is allowed with costs.

It is so ordered.

**DATED** at **SUMBAWANGA** this 21<sup>st</sup> day of July, 2022.



J. F. NKWABI

**JUDGE**