IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 261 OF 2022

(Originating from the Judgment and Decree in Land Application No. 206 of 2015 at Kinondoni District Land Housing Tribunal delivered on 16 March 2022, Hon. Mbilinyi, Chairman)

EMMANUEL IKOKI..... ...APPELLANT

VERSUS

HENRY BUNDALA.....RESPONDENT

JUDGMENT

Date of last Order:06/02/2023
Date of Judgment:10/03/2023

K. D. MHINA, J.

The main issue of controversy between the parties to this appeal is the ownership of a parcel of land described as plot No. 472 Block "E" Tegeta area in Kinondoni Municipality, comprised in the letter of offer of the right of occupancy with No. LD/149982/1/JKD.

In the District Land and Housing Tribunal ("the DLHT") for Kinondoni at Mwananyamala in Land Application No. 206 of 2015, the respondent herein, Henry Bundala, sued the appellant, Emmanuel Ikoki, over the ownership of that parcel of land and claimed for the following reliefs; a declaration that he was a lawful owner of the disputed land; a declaration that the appellant encroached into his land; the permanent injunction to

restrain the appellant or his agents or workmen or servants from trespassing/ encroaching into his land; specific damages at a tune of TZS 8,000,000/=and costs for the suit.

The brief facts which led to the institution of Application No. 206 of 2015 before the DLHT are that the respondent was allocated the plot in dispute by the then Ministry of Land, Housing and Urban Development vide a letter of offer with reference No. LD/149982/1/JKD dated 2 February 1991. According to the plaint/application, he alleged that since he was allocated the land, he enjoyed a peaceful occupation without any interference until 2011, when the appellant unlawfully encroached into the plot for about 26.726 meters from beacon no. IPC21D and 15.50 meters from beacon no P1 by erecting a wall inside his land. After that, he requested the Kinondoni Municipal Council to revive the boundaries of the land in dispute to clarify the boundaries. After that exercise, the Municipal Council Surveyor informed him that the development made by the appellant, who was the owner of Plot No. 471 by constructing a wall, had encroached on his plot, i.e., Plot No. 472

It is this background that prompted the respondent to rush and seek redress in the DLHT.

On his side, the appellant's story was that he bought the land at Tegeta in parcels from three different owners as a farm in 1984 and 1985. But upon a survey of that land by the Ministry of Land, it was divided into two plots, No. 471 and Plot 472, both Block "E." He was given plot No. 471 Block "E," but the Ministry did not hand over to him Plot 472 Block "E" despite his request and efforts to follow up. Therefore, he alleged that the allocation of the land in dispute was tainted with illegality because, under the law, the appellant was to be considered and given the letter of the offer first since he was already in occupation of the land. Further, he was not compensated for the land before the survey.

After the trial, the DLHT was satisfied that the respondent proved his claims of ownership and declared him as the lawful owner of Plot 472 Block "E," Tegeta area. The reasons for that decision were; one, the respondent had a letter of offer to prove his ownership; two, the appellant admitted that after surveying his farm, the farm was divided into two plots, plot No 471 Block "E" and plot. No. 472 Block "E" and that he was allocated plot No. 471 while plot No 472 was allocated to another person; three, the claims that the appellant was not paid compensation before the survey,

which resulted in the plot in dispute should be directed to the Ministry of Land and not to the respondent.

Aggrieved by that decision, the appellant preferred this appeal, raising the following two grounds: -

1. *That the trial Tribunal erred in law and fact by not clearly considering and evaluating the evidence of the appellant that the respondent did not have cause of action against him in terms of time as the doctrine of adverse possession barred him to sue the appellant for trespass in 2015 being almost 29 years after appellant occupy the said piece of land in 1984 from Ali Nasoro Mpey, Mr. Yahya Yusufu and Mr. Salum Said.*
2. *The trial Tribunal erred in law and fact by holding that the appellant is the trespasser of the disputed land without considering that the said land was owned by the appellant prior to its survey and had developed the plot by constructing permanent structures.*

The appeal proceeded by way of written submissions, and the appellant had the services of Mr. Eben Silayo, learned counsel, while Mr. Joseph Mafie, also learned counsel, represented the respondent.

On the first ground of appeal, Mr. Silayo briefly narrated how the appellant came to possess the disputed property. He submitted that the respondent bought the said suit land in 1984, 1985, and 1986 from different landlords. He purchased one piece of the suit land from Ali Nasoro

Mpei on 02/02/1984, a part of the land from Mr. Yahya Yusuf on 25/03/1984 and 19/8/1986, respectively, and one piece of the suit land from Mr. Salum Said on 02/09/1985. He developed the suit premises by building therein a family house.

He further submitted that upon acquiring the suit premises, the appellant initiated the process of getting a title deed from the Commissioner for Land. However, the process did not bear fruits as he discovered that the suit land was allocated to one Ally Abeid Karume, but later on, the same title was revoked for a reason best known by the Commissioner for Land.

Mr. Silayo submitted that while the appellant occupied and developed the suit premise since 1984 and he had a nice living up to 2015 when the respondent sued him while the respondent alleged that he owned the suit land since 1991 after being allocated by the Commissioner for Land, but he failed to develop that land because the same was trespassed by the appellant. Therefore, without any doubt, the cause of action to this dispute arose in 1991 when the respondent discovered that his land was trespassed by the appellant. Still, he decided without any reason not to sue the appellant until 2015, almost after 24 years of such discoveries.

Therefore, he submitted that prima facie, the respondent did not have the cause of action regarding time limits to sue the appellant as per **part I item 22 of the Law of limitation Act,** which provides for the time limit for the suit for recovering land is twelve years**.** Therefore, the case was primarily bad in law.

In his further submission, Mr. Silayo submitted that the doctrine of adverse possession primarily bared the respondent to claim ownership over the land in dispute because the appellant occupied, developed, and stayed therein for more than 29 years without being disturbed by anyone. To bolster his submission, he cited the following cases; one, **Registered Trustee of Holy Spirit Sisters Tanzania vs. January Kamili Shayo and 136 others, Civil Appeal No. 193 of 2016 (CAT at Arusha),** where the court listed essential ingredients to look into as follows;

i. *That the statutory period, in this case, twelve years, had lapsed;*
ii. *That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*
iii. *The nature of the property was such that, in the light of the foregoing, adverse possession would result."*

Two, **Hussein Taloo Vs Kandege Menlandi Kandege,** Land Appeal No 136 of 2021 (HC-DSM Tanzlii), and three **Aloysius Benedicto Rutaihwa**

Vs. Emmanuel Bakundkize Kendurumo and nine others, Land Appeal No of 2020 (HC-Bukoba), while citing the cases **Moses Vs. Lovegrove (1952)** and **Hughes v. Griffin (1969). 1 All ER 460** held that;

> *"...now, based on the above position of the law, even if the respondents were mere adverse possessors, the appellant have lost right of claim over the land as the respondents have occupied and possessed the land for over 36 years without interruption....."*

Four, **Herbert Rogers Mwaimu vs. Abdallah Chumu Yusufu,** Land Appeal No. 136 of 2016 (HC- Land Division), while citing the case **of Moses vs. Lovegrove (1952)** and **Hughes v. Griffin (1969). 1 all ER 460,** held that;

"a person seeking to acquire little to land by adverse possession had to accumulatively prove the following: -

(i) That, the statutory period, in this case twelve years has lapsed

(ii) That, there had been no interruption to the adverse possession, throughout the aforesaid statutory period".

He concluded by submitting that based on the above submission; the appellant owes the legal ownership of the suit premise.

For the second ground of appeal, Mr. Silayo faulted the DLHT by submitting that the appellant had been living, developing, and occupying

the suit land since 1984 without any interruption from any persons until 2015, when the respondent filed a lawsuit against him for the allegations that the appellant was the trespasser to the suit premise, without regarding the fact that the appellant had been in the case land for almost 29 years peacefully prior to its survey. He developed the said land by constructing permanent structures.

He further submitted that the appellant was not a trespasser as proclaimed, as he holds the ownership of disputed land under the deemed right of occupancy prior to a government survey, which has the same effect as the granted right of occupancy. To bolster his argument, Mr. Silayo cited sections 4(3) and (6) of the Land act [Cap 113 RE 2019], which provides that:

(3) "Every person lawfully occupying land, whether under a right of occupancy whether that right of occupancy was granted or deemed to have been granted or under customary tenure, occupies and has always occupied that land, the occupation of such land shall be deemed to be property and include the use of land from time to time for depasturing stock under customary tenure"

(6) "Nothing in this section shall be constructed to affect the validity of any right occupancy lawfully granted or deemed to have been

granted or consented to, under the provisions of any law in force in Tanzania before the commencement of this Act."

He further argued that the law protects both the deemed and the granted right of occupancy. Therefore, the appellant was not a trespasser because he was not granted the right of occupancy. To bolster his argument, he cited the following cases; one **Village Chairman- KCU Mateka vs. Anthony Hyera (1988) TLR 188,** the court held that; -

"Allocation of which is under the possession of others would not only bring lawlessness and anarchy in the society but would also retard the developments of society."

Two, **Kihonda Pitsa Makaroni Industries Limited vs. B.R. Shindika t/s Stella Secondary School,** Land Case no. 197/2005 (HC-DSM), which cited the case of **Judith Yoas & 15 others Vs. Kibaha Housing Cooperative Society Limited (KIHOCOSO),** Land Appeal No. 19 of 2017 (HC-Land Division), the court held that:-

"....to grab one citizen a land and give it to other without justifiable cause, the same amounts not only to discrimination but also to oppression, land degradation and humiliation which were among the characteristics of colonialism".

Three, **Methuselah Paul Nyagwaswa Vs. Christopher Mbote Nyirabu** (1985) TLR 103 where the court of appeal held that:

> *"...A holder of right of occupancy under native or custom does not automatically become a squatter when an area is declared planning area".*

He concluded by submitting that it suffices to declare that the granted right of occupancy, which the respondent portrayed to be given by the Commissioner for Land in 1991, if any, is totally invalid ab-initio because the doctrine of deemed right of occupancy that the appellant had under the disputed land and also the doctrine of adverse possession since the appellant had been occupying disputed land since 1984 prior to its surveyor and the statutory period of recovering land which is twelve years.

In reply, Mr. Mafie started by attacking the first ground of appeal, that the ground is misconceived and has no legs to stand or be entertained by this Court.

He argued that the issue of time limit or adverse possession was not among the issues framed and decided at the trial Tribunal. Further, it was not even pleaded in the pleadings at the Trial Tribunal. To substantiate his

argument, **Yusuf Khamis Hamza vs. Juma Ali Abdalla**, Civil Appeal No. 25 of 2020 (Tanzlii),

> *"In this case the issue of time bar was not raised by the parties in their pleadings. In this sense it was quite in order and absolutely perfect for the court below not deal with matters which was not canvassed in pleadings".*

Further, Mr. Mafie submitted that the Court of Appeal pronounced the same position in **Peter Ng'homango vs. The Attorney General**, Civil Appeal No. 114 of 2011 (unreported)

From the above-cited cases, Mr. Mafie submitted that from the tribunal, the issue of adverse possession was not among the issues agreed upon by the parties. The framed issues are articulated at page 2 of the Tribunal's typed judgment. The issues framed were as follows, I quote;

"Viini vya mgogoro vilivyopendekezwa na pande zote mbili na kupitishwa na baraza ni vitatu kama ifuatavyo"

1. *Nani ni mmiliki halali wa eneo lenye mgogoro*
2. *Kutokana na jibu la kiini cha mgogoro namba 1 kama kweli Amri zuio la kudumu litolewe dhidi ya mjibu maombi*
3. *Nafuu zipi zitolewe kwa mhusika*

Mr. Mafie contends that since the issue of time bar and doctrine of adverse possession was not pleaded, and there were no material facts placed before the tribunal, then the tribunal acted within the purview of the law when it proceeded to hear and determine the dispute on merits according to the issues framed and evidence adduced by the parties.

He concluded by urging this Court to disregard the first ground of appeal and dismiss it with cost as it intends to bring a new issue at the appellate stage while the issues were not addressed at the trial.

On the second ground of appeal, Mr. Mafie submitted that the trial tribunal heard parties and allowed each to present his case. The appellant narrated to the Trial Tribunal his ownership of the farm before demarcation. Later after demarcation/survey, he was allocated one plot, Plot No. 471 Block E Tegeta. The second Plot No. 471 Block E Tegeta, was allocated to Ali Abeid Karume.

In that regard, Mr. Mafie submitted that the testimony by the appellant was conclusive evidence that after the survey, the land was demarcated into two plots; one belongs to the appellant, and the other belongs to another person. Further, the trial tribunal scrutinized the

evidence by the appellant and found that the appellant was not contesting on ownership, but he claimed compensation, of which he was advised to approach the Ministry of Lands if he thought he was entitled to compensation. He cited page 6 of the trial Tribunal's judgment where it was held.

> *"mjibu maombi ametoa Ushahidi wa umiliki shamba kabla ya upimaji, lakini amekiri katika ushahidi wake kwamba baada ya upimaji shamba lake lilitoa viwanja namba 471 kitalu E Tegeta na kiwanja namba 472 Kitalu E Tegeta na kwamba yeye alipata kiwanja Na 471 kitalu E Tegeta ba anamiliki mapaka sasa"*

From the above, Mr. Mafie submitted that the Trial tribunal was correct in its decision since the disputed area was surveyed and registered land. And the fact that the issue of adverse possession could not apply to the registered land.

He concluded by submitting that if the appellant wished to be paid compensation, he was supposed to refer the claim to the authority which surveyed his land and allocated it to the respondent.

The appellant did not file the rejoinder.

Having considered the rival written submissions filed by the parties and closely examined the record of appeal and the grounds of appeal, I will start to deliberate and determine the first ground of appeal.

The main issue in the first ground of appeal is whether the respondent was barred by the doctrine of adverse possession to sue the appellant for trespass. Therefore, there are two sub-issues; one, time limitation, and two; adverse possession.

I will start with the first sub-issue, and in this, the entry point is the cited decision of the Court of Appeal of the **Registered Trustee of Holy Spirit Sisters Tanzania** (Supra), whereby the circumstances under which a person seeking to acquire title to land under the doctrine of adverse possession were aptly explicated. The circumstances are as follows;

"On the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following: -

(a) That there had been the absence of possession by the true owner through abandonment;

(b) that the adverse possessor had been in actual possession of the piece of land;

(c) that the adverse possessor had no color of right to be there other than his entry and occupation;

(d) that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;

(e) that there was a sufficient animus to dispossess and an animo possidendi;

(f) that the statutory period, in this case twelve 12 years, had elapsed;

(g) that there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

(h) that the nature of the property was such that in the tight of the foregoing/ adverse possession would result."

[Emphasis provided]

From above, it is therefore critical that the time under which the adverse possessor may have been in uninterrupted occupation of that property is of great essence. The limitation period to recover land is 12 years as per section 3 (1) of the LLA, read together with Part I item 22 of Part I to Schedule of the same Act.

In that matter, at the trial, the issue of the time limit was not an issue at all, and it was not pleaded, not framed as an issue, nor decided by the DLHT.

In the application/plaint in paragraphs 6 (a) (2) and (3), the respondent pleaded that;

"2. The applicant has occupied the above-mentioned plot for more than 24 years.

3. That since that time the applicant had been in a peaceful and enjoyable occupation of the above plot without any interference from any person until in the year 2011 when the respondent unlawfully and without any color of right encroached into the applicant's plot for about 26.726 meters from beacon IPC21D and 15.50 meters from beacon No. P1 by erecting a wall inside the applicant's piece of land".

The appellant did not raise a preliminary objection or plead the time limitation issue in his reply, "written statement of defence." He only narrated how he acquired the land in dispute since 1984.

Following the discussion above, the law clearly states that parties are bound by their pleadings; therefore, since the issue of time limitation was not raised in the pleadings, the trial tribunal was absolutely correct not to deal with it. I cement this position with the cited case of **Peter Ng'homango (Supra),** where it was held that;

"We think it is clear that a judge is duty bound to decide a case on the issues on records and that if there are other question, they must be placed on record. The decision of the court should be based on the issues which are agreed upon by parties, and if this is not done it result miscarriage of justice. The situation becomes worse if it departs from the issue agreed upon".

I am aware that the question of time limitation, as it touches on jurisdictional issues, can be raised at any stage, even at the appellate stage. But in this matter, the pleadings and the material evidence available for and against whether the cause of action arose in 2011 as alleged by the respondent are not available enough to enable this Court to determine the issue. Further, because it was not an issue at dispute, the parties did not labour themselves much to testify when the cause of action arose. In the cited case of **Yusuf Khamis Hamza** (Supra), it was held that;

".... the appellant raised the issue of time limitation for the first time at this second stage of appeal. Since it was not pleaded and there were no material facts placed before the Tribunal, the Tribunal could not have dismissed the respondent's suit. We find that it acted within the purview of the law when it proceeded to Hear and determine the dispute on merits. Of course, we are alive with the settled position of law that time limitation goes to the

jurisdictional issue of the court and that it can be raised at any time, even at the appellate stage by the court, but in order for it to be noted and raised it would require material evidence

be placed before the court. In the present appeal, there is none.....

That being the case, we failed to get any other material evidence

to suggest that the suit was time-barred".

On the second sub-issue of the principle of adverse possession, there is no dispute that the suit land was a registered land described as plot No. 472 Block "E" Tegeta area in Kinondoni Municipality, with the letter of offer of the right of occupancy with No. LD/149982/1/JKD issued to the respondent. It is from the above fact that the entry point in the deliberation of the second sub-issue is the **Hon. Attorney General vs. Mwahezi Mohamed (As Administrator of the Estate of the late Dolly Maria Eustace) and three others,** Civil Appeal No. 391 of 2019 (Tanzlii) where the Court of Appeal held that;

"In our considered opinion, the trial Judge correctly applied the doctrine of adverse possession, because unlike in an unregistered land, the adverse possession over the registered land is not automatic.

.....the appellant cannot claim ownership over the suit property by an adverse possession without following the legal procedure entailed under section 37 of the Limitation Act".

From the above-cited decision, again, the issue of adverse possession lacks merit because it was not pleaded at the trial, and it was neither an issue nor decided by the court.

Two, no material evidence is placed before the Tribunal; for instance, there is no material evidence on whether the requirements of section 37 (1) of the LLA were complied with. That provision of the law reads that;

"37 (1) Where a person claims to have become entitled by adverse possession to any land held under a right of occupancy or for any other estate or interest, he may apply to the High for an order that he be registered under the relevant law as the holder of the right of occupancy or such other estate or interest, as the case may be, in place of the person then registered as such holder, and the High Court may, upon being satisfied that the applicant become so entitled to such land, make an order that he be registered accordingly, or may make such order as the High Court may deem fit".

From the above analysis, the first ground is devoid of merits.

As regards the second ground of appeal, this should not detain me long because after going through the records of the DLHT, I observe that

the appellant has no justification to fault the trial Judge for the evaluation and analysis made. Because from the record, there is no dispute that the appellant was the owner of the land before it was surveyed and demarcated into two plots by the Ministry of Land. Further, there was no dispute that the appellant was allocated a Plot after the survey and demarcation. No 471 while the respondent Plot. No 472 (suit land), both block "E" Tegeta area. The appellant admitted that he was allocated only that one plot. It was on that factual evidence that the DLHT decided the matter in favour of the respondent.

Further, the DLHT held that while the respondent tendered the letter of offer (Exh. P1) to prove his ownership of the disputed plot, the appellant did not tender any document to prove his ownership rather than tendering the documents to prove ownership before the land was surveyed and demarcated.

At the DLHT, the appellant stated that he was not compensated before the Ministry of Land's survey and demarcation of his land. On this issue, as rightly observed by the DLHT, if he was not compensated by the Ministry of Land, who surveyed, demarcated, and allocated the land in

dispute. The appellant was supposed to claim from the Ministry rather than from the respondent to whom the Ministry of Land allocated him the plot.

Therefore, from the above elaboration, this second ground also must fail because it lacks merit.

In view of the aforesaid, the entire appeal lacks merit; therefore, the DLHT decision remains undisturbed. Consequently, the appeal is dismissed with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 10/03/2023.

K. D. MHINA
JUDGE