

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

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**MISC. LAND APPEAL NO. 03 OF 2022**

**SEZALI MAPANGO.....APPELLANT**

**VERSUS**

**STESHENI NDUGALI..... RESPONDENT**

*(Originating from Land Appeal No. 04/2021 from DLHT for Rukwa, Originating from Land Dispute No. 30/2020 from Korongwe Ward Tribunal)*

**JUDGMENT**

*29/03/2023 & 17/05/2023*

**MWENEMPAZI, J.:**

This is the appellant's second bite in the court of justice as he was aggrieved with the decision of the District Land and Housing Tribunal of Rukwa at Sumbawanga (First appellate tribunal) in which the decision of the Ward Tribunal (Trial Tribunal) was upheld whereas the respondent mentioned above was declared the rightful owner of the piece of land which made the two parties be in a tag of war over its lawful possession.

Having failed in his first attempt appealing against the decision of the trial tribunal, the appellant preferred this appeal to this Court consisting of four grounds which are as hereunder;

1. That. the first appellate tribunal erred in law and fact by giving decision

on uncertain of size of disputed land and location of the land dispute.

2. That, the first appellate tribunal erred in deciding the dispute without analysing and considering evidence adduced by the appellant.
3. That, the first appellate tribunal erred in law and in fact in evaluating evidence on principle of adverse possession while it is the appellant who occupied the disputed land for a long time than the respondent.
4. That, the first appellate tribunal erred in law to give decision in favour of the respondent while three members of the trial tribunal named RIDIA P. KALAMA, AGINES L. NDUNGULE and SALOME F. POSOLO were not present on 22.12.2020 when the respondent's witness adduced his evidence.

The appellant then prays for the court to allow this appeal, and in doing so the decision of the two lower tribunals be quashed and set aside, in which he, the appellant be declared the lawful owner of the disputed land, and the cost of this suit be borne by the respondent.

As this appeal was scheduled for hearing the appellant was represented by Mr. Peter Kamyalile learned advocate who was holding in brief for Ms. Neema Charles who was sick and the respondent was enjoying the legal services of Mr. Fredrick Nyamoga. Both sides agreed on settling this matter by way of written submissions, and this court gladly granted their option.

The appellant started off by submitting for the first ground of appeal that, it was settled by the law that in order to settle a land dispute among parties it is the legal requirement for the tribunal to make sure that the land in dispute is identified properly. That, a sufficient identification of the location of the disputed land in land cases before the ward tribunal especially those related to disputes of ownership or possession is not an option but a mandatory requirement.

She proceeded that the legal requirement is more express when it comes to land disputes of this nature before the District Land and Housing Tribunal and the High Court. She cited regulation 3(2)(b) of the Land Dispute Court (The District Land and Housing Tribunal) Regulations 2003 (GN No. 174 of 2003) and Order VII Rule 3 of the Civil Procedure Code Cap 33 R. E. 2019 whereas she illustrated that all these provisions mandatorily require the plaintiff before the District Land and Housing Tribunal or the High Court to effectively describe the land in dispute when instituting proceedings by an application or plaint correspondingly.

Ms. Neema added that, the two lower tribunals decided this matter in favour of the respondent whereas he had failed to describe the land in dispute in his evidence as he adduced that he is the owner of the disputed land, dry land and grassland but he never mentioned the location and the size of the

same. In insisting this point, she referred this court to the case of **Agast Green Mwamanda (As Administrator of the Estate of the Late Abel Mwamanda) vs Jena Martin, Misc. Land Appeal No. 40 of 2019** (Unreported) at page 11 & 12 and she again referred this court to the case of **Grace Ashimogo & 2 Others vs Zebio Real Estate Co. Ltd, Land Appeal No. 76 of 2019** (Unreported) at page 17.

Submitting for ground number two, Ms. Neema argued that the evidence adduced by the appellant shows that he used the land in dispute since 1986 and the respondent trespassed to that land on 2019. She added that, but the trial tribunal did not take into consideration the evidence adduced by the appellant and his witness known as Melikio Pondamali which proved the ownership of the disputed land.

She proceeded by insisting that the respondent's evidence was contradictory between him and his witnesses, as he stated that he started to own the land in dispute on 1993 while the evidence adduced by his witness known as Gazeli Kabisu stated that he was bordering the respondent on 2008 and his other witness known as Victory Makamuls stated that he started to own the disputed land in on 1996. Considering these witnesses, Ms. Neema insisted that the respondent lacked cogent evidence in proving the ownership of the land in dispute because there were contradictions in the statements of

respondent's witnesses.

Submitting for ground number three, Ms. Neema argued that it is undisputed fact that the appellant is the one who owned the disputed land for a long time since 1986 up to 2019 as he adduced his evidence which was supported by his witness. She added that, the issue of adverse possession cannot be applicable in this scenario since the respondent's evidence failed to prove exactly when did he start to own the said land since the evidence adduced by him differed with the evidence adduced by his witness, which created a lot of contradictions. She said that, for the trial tribunal to decided this matter in favour of the respondent, it was against the fact because the respondent had failed to prove his case on the balance of probabilities, despite arguing that he possessed the disputed land for over 27 years.

The learned counsel supported her arguments by referring this court to the case of **Hughes vs Griffin (1969) ALL ER 260** where the court held that;

*"It is trite that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with permission of the owner. Thus, 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 absence of possession by the true owner*

*through abandonment;*

*b. That the adverse possessor had no colour of right to be there other than his entry and occupation*

*c. That the statutory period of twelve years had elapsed.”*

Submitting on the fourth ground, Ms. Neema submitted that it is trite of the law that the ward tribunal must be properly composed when sitting to make a decision, and she cited Section 11 of the Land Dispute Courts Act Cap 216 R. E. 2019 in insisting her point. She added that, the records of trial tribunal reveals that the tribunal was not composed as per the law and to make it even worse, there are three members who appear in the judgement but they were not in the hearing (Ridia P. Kalama, Agness L. Ngulule and Salome F. Posolo). The learned counsel added by referring this court to the case of **Samwel Tibenderana vs Kokuberwa Gozibert, Misc. Land Appeal No. 78 of 2011** at page 8, where the court allowed the appeal as it realised that the ward tribunal was not properly composed.

She also cited the case of **Ashura Mohamed Mbagalo vs Mwanangoy Mtoro Mwanangoy, Misc. Land Appeal No. 112 of 2019** HC at Dar es Salaam at page 4 where there were members who were appearing of the judgement and did not participate in the hearing, the High Court held

that due to serious irregularities which goes to the root of the case, that the irregularities have vitiated the judgement of the trial tribunal and the same needs to be reversed.

Ms. Neema then rested her submissions by stating that basing on the submissions she made above and the relevant authorities she pinned in, she prayed for this appeal to be allowed and the decisions of the Ward Tribunal and the DLHT to be quashed and cost of this appeal to be borne by the respondent.

In responding to the submission made by the counsel for the appellant, the respondent started off by stating that he will respond to the first and second grounds of appeal together. He proceeded that during the hearing of the case at the trial tribunal and at the appellate tribunal, the respondent stated that he started using the dry land and the wet land by the year 1993, and his testimony added that the neighbours to his land were Mzee Unyese and Melkio Mipango and his testimony was supported by his witnesses namely Gazeli Kabisu and Victory Makamula.

He added that, in both tribunals it was revealed that it was the respondent who was in possession of the disputed land since 1993 until 2019 when the dispute arose. In addition, he submitted that during the trial, he testified to have buried his loved ones at the very disputed land without any

interference. In supporting his argument, the respondent cited Section 119 of the Evidence Act [Cap 6 R. E. 2019].

Submitting against the third ground of appeal, the respondent submitted that the two lower tribunals were correct to base on the principle of adverse possession because, he has been in possession of the said land for more than 27 years as he acquired the land in the year 1993 by clearing the forest and began using it without any disturbance from any person until when the appellant herein came on 2019 to claim that respondent has trespassed.

The respondent insisted that, it is now the position of the law that a long and undisturbed possession of a land passes title to the occupier and that the courts would not disturb him. The respondent then referred this court to the case of **Shaban Nasoro vs Rajabu Simba [1967] HCD 233**, where the High Court held that: -

*".....the court has been reluctant to disturb persons who have occupied land and developed it over a long period.....the respondent and his father have been in occupation of the land for a minimum of 18 years, which is quite a long time. It would be unfair to disturb their occupation."*

The respondent insisted further by referring this court to the case of **Musa Hassani vs Barnabas Yohanna Shedafa (Legal Representative**



**of the Late Yohanna Shedafa), Civil Appeal No. 101 of 2018** CAT Tanga (unreported) at page 17 and 18 which also underlined that the courts have been reluctant to disturb persons who have occupied land and developed it over a long period of time.

He then added that, it is clear that he has been enjoying the use of the disputed land for a long time as it was also the decision of the first appellate tribunal. Submitting further, he said that he also took note that the appellant did not advance evidence during the trial to show that the principle of adverse possession shielded him from bringing any witnesses to testify that the said land was owned by him, and even worse he did not even declare the acres that are trespassed. And therefore, the respondents proceeded to submit that it is clear that he is not a trespasser to the disputed land, rather he his the lawful owner because has been in occupation of that land for more than 27 years and he insisted that the position of the law is clear that the use of land after twelve (12) years had elapsed, the person occupying the same is said to be the lawful owner of the same and it is said that the person had acquired the particular land by adverse possession. The respondent then cited Section 3(1) of the Law Limitation Act Cap 89 R.E. 2019 which is read together with PART 1 of Item 22 to First Schedule of the same Act. He also referred this court to the case of **Bhoke Kitang'ita vs Makuru Mahemba, Civil Appeal No.**

**222 of 2017 CAT** (Unreported) at page 7, 8 and 9 of the case, and also the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016 CAT** (Unreported) which with approval the decision of a **Kenyan case of Mbira vs Gachuni [2002] EA 137 (HCK)** in which again, reliance was made in the case of **Moses vs Lovegrove [1952] 2 QB 533** and **Hughes vs Griffin [1969] 1 ALL ER 460**, it was held that:-

*"[On] the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following;*

- a. That there has been 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 colour 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 of the land for purpose for which he intended to use it.*
- e. That, there was a sufficient animus to dispossess and an animus 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 light of the foregoing/adverse possession would result."*

In that, the respondent insisted that as far as his evidence is concerned, it is of the settled view that this situation as fallen under the circumstances outlined above as he as submitted earlier.

Submitting against the fourth ground, the respondent submitted that at the trial tribunal during the hearing especially when the witnesses of the respondent were testifying, there were four members including the chairman of the Ward Tribunal, and as the Ward Tribunal are established under the Ward Tribunal Act Cap 206 R. E. 2019, Section 4 which is read together with Section 11 of the Land Dispute Courts' Act, Cap 216 R. E. 2019 which provides for the minimum and maximum number of the quorum of the tribunal during a hearing. The respondent then reproduced an extract of the cited sections above in emphasis, and winded up that as the chairman is also a member of the Ward Tribunal, therefore the composition of the quorum was correct at the trial tribunal.

In his conclusion, the respondent submitted that he prays for this appeal to be dismissed with costs for it lacks merit and that the decision of both lower tribunals be upheld.

In rejoinder, Ms. Neema submitted that before she embarks on her rejoinder as intended, she drew the attention to this Court that the respondent did not reply on the first ground of appeal and in that circumstance, she insisted that the respondent has conceded it that the first appellate tribunal erred in law and fact by giving decision on uncertain of size of the disputed land and location of the land in dispute although in his submission, he did submit that he will respond to the first and second grounds of appeal jointly but responded to the second ground only.

However, she submitted furtherly that she recapitulates their earlier submissions that the evidence adduced by the respondent creates contradictions since it differs from his witnesses. In addition to that, Ms. Neema submitted that the respondent lacked cogent evidence to prove ownership of the land in dispute as a result of the contradictions in his evidence.

Ms. Neema proceeded further that the issue of adverse possession cannot be applicable in this scenario since the respondent's evidence as adduced by him failed to prove exactly when he started to own the said land since the evidence adduced by him differ with the evidence adduced by his

witnesses. And on the last ground, Ms. Neema insisted that the respondent's response lacks merit since he failed to state why the afore mentioned three members of the tribunal namely Rida P. Kalama, Agnes L. Ndugule and Salome F. Posolo were not present on 22.12.2022 when the respondent's witness was adducing his testimony.

Conclusively, the learned counsel submitted that with the above brief rejoinder, her side reiterates their earlier submission and ask this court to quash and set aside the decision of both lower tribunals and in doing so, do declare the appellant as the lawful owner of the disputed land, therefore this appeal be allowed with costs.

After keenly reading between the lines the submissions from both sides, grounds of appeal and reply thereto, I am fortified that the only issue to be dealt with here is **whether this appeal is meritorious**. In dealing with this raised issue, I will respond to the grounds of appeal as raised by the appellant and in doing so this matter will be settled. Keeping in mind that, this being the second appeal, this court is only entitled to interfere with the concurrent findings of the lower tribunals if the appellant has raised grounds that shows the findings in this instant matter were based on misdirection or misapprehension of evidence or violation of some principles of law or procedure, which have occasioned serious miscarriage of justice. See, **Farida**

**& Another vs Domina Kagaruki, Civil Appeal No. 136 of 200**  
(unreported).

Starting off with the first ground as raised by the appellant, the records in appeal reveals that the appellant was the one who instituted a suit against the respondent at the trial tribunal for trespass. It is the trite of law that, the one who alleges must prove the existence of the allegations. In **Barelia Karangirangi vs Asteria Nyalwambwa, Civil Appeal No. 237 of 2017, CAT** at Mwanza (unreported), it was held that the principle governing proof of case in the civil suits is that the one who alleges must prove. It was the firm view of the Court of Appeal as it cited sections 110 and 111 of the Tanzania Evidence Act [Cap. 6 RE 2002] to justify its findings on that issue.

In this matter at hand, the records reveals that the appellant sued the respondent at the Ward Tribunal for trespass over the disputed land that he claimed to acquire ownership since the year 1986, but in his testimony, he did not clarify the size and location of the land in dispute. As he was the claimant, the law required him to clarify extensively on the matter in dispute, and in that it was not the duty of the respondent. Therefore, I find no merit in this ground of appeal and proceed to dismiss it.

On the second and third grounds of appeal which I will deal with them together is that, the standard of proof in Civil suits is based on balance of

probabilities and not otherwise, whereas the literal meaning of balance of probabilities is that, **the occurrence of an event was more likely than not.** See, **Agatha Mshote vs Edson Emmanuel & 10 Others Civil Appeal No.121 of 2019** Court of Appeal of Tanzania at Dar es Salaam.

In this matter at hand, again the records reveals that the appellant claimed to possess the disputed land from the year 1986 up until the year 2019 when he alleged that the respondent trespassed into it. As he failed to clarify the actual size and location being trespassed by the respondent, the latter also claimed to be in possession of the said land from the year 1993 up until he was sued by the appellant. In my understanding, it would have been more probable that the respondent had trespassed the disputed land if the suit against him was instituted in the year 1993 and not 2019.

It is my holding that, the appellant had failed to prove his case against the respondent on the balance of probabilities, as I find it impossible for the two of them to be on the same land from the year 1993 (the year respondent started possessing the land) up until 2019 when the appellant noticed the intervention of the respondent on the said land.

I find it prudent as the first appellate tribunal applied the principle of adverse possession in determining this matter. As I clarified above that, as the two sides are hostility, it is quite impossible that the appellant had sustained

the presence of the respondent on his land for over 27 years and decided to sue him in the 2019 for trespass. To me, as I read over the records over and over again, the appellant would have not been tolerable the moment his land was trespassed, and so, as the respondent claims to have owned the disputed land from 1993, and the appellant claimed to have owned the same from 1986, the appellant would have sued the respondent in 1993 and not 2019.

Therefore, the fact that the respondent possessed the disputed land from the year 1993 without any interruption up until the 2019, it is safe to declare that the respondent has been in possession of the disputed land throughout the statutory period of 12 years and the law is very clear as a broad day light that a claim for recovery of land cannot be brought to court of law after the expiration of twelve years (12), in such scenarios, the court of laws have been reluctant to disturb persons who have been in occupation of the land for a long period. See, **Moshi Salum vs Juma Mkombozi, PC Civil Appeal No. 135 of 2003**, HC at Dar es Salaam (Unreported). Therefore, I find no merits to ground 2 and 3 and proceed to dismiss them.

Coming to the last ground of appeal, looking into the records specifically the grounds of appeal to the first appellate tribunal, I find this ground to completely be a new ground. The Court of Appeal has on several occasions held that a ground of appeal not raised in first appeal cannot be raised in a



second appeal.

As a second appellate court, I cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court or rather tribunal. The record of appeal shows that this ground of appeal by the appellant was not among the appellant's six grounds of appeal which he filed in the District Land and Housing Tribunal for Rukwa at Sumbawanga. In the case of **Abdul Athuman vs Republic [2004] T.L.R 151**, the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised, and the Court of Appeal held that; the Court of Appeal has no such jurisdiction. In similar vein, I therefore struck out this ground of appeal.

Following the above analysis, this court finds out that this appeal lacks merits and it is hereby dismissed with costs. This court proceeds otherwise to uphold the decision of the District Land and Housing Tribunal for Rukwa at Sumbawanga.

It is so ordered.

Dated at Sumbawanga this 17<sup>th</sup> day of May, 2023.



  
**T.M. MWENEMPAZI**  
**JUDGE**

**Court:** Judgment delivered in Court in the presence of parties.



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**T.M. MWENEMPAZI  
JUDGE  
17/05/2023**

Right of appeal explained.



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**T.M. MWENEMPAZI  
JUDGE  
17/05/2023**

ORIGINAL