

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 361 OF 2023

(Originating from Application No. 199/2017,
Kibaha District Land and Housing Tribunal)

ZAWADI SAID.....APPELLANT

VERSUS

NURU SWAIBA KUNAMBI.....RESPONDENT

JUDGMENT

14/11/2023 to 12/12/2023

E.B. LUVANDA, J

At the Trial Tribunal, the Respondent named above successfully sued the Appellant above named for ownership of one and half acre piece of land located at Amani, Kerege Bagamoyo, Coast Region. The trial Tribunal declared the Respondent the rightful owner and adjudged the Appellant trespasser and ordered to pay the Respondent a sum of Tshs 5,000,000/= as compensation for destruction. In the amended petition of appeal, the Appellant raised four grounds of Appeal; One, the trial Chairperson erred in law and facts by making a decision that the Respondent herein is a lawfully owner of the suit property without having any documentary evidence while the Appellant had documentary

evidence to prove the lawful ownership of the suit land; Two, the Tribunal erred in law and facts for holding in favour of the Respondent without considering that the Appellant lawfully owned and enjoyed the disputed land for almost more than eighteen years uninterrupted and made several development therein; Three, the trial Chairperson erred in law and facts by pronouncing a judgment in the proceedings which was transferred and re assigned to different chairpersons without assigning reasons for taking over the trial hence are nullity proceedings and judgment; Four, the trial chairperson erred in law and facts by conducting a trial with one assessor after the death of one assessor in a preliminary stage of the trial which make the Tribunal improperly constituted which affects the coram and jurisdiction of the trial Tribunal, hence the whole proceedings and judgment are nullity; Five the trial Chairperson erred in law and facts for pronouncing judgment without a clear identification as to what were the real boundaries or demarcations of the suit land while in facts the parties to the disputed were claiming different size of the suit land with different boundaries hence erroneous decisions.

Mr. Philemon Mganga learned Counsel for Appellant submitted that the trial chairperson erred in law and facts by announcing (sic, declaring) that the Respondent is the owner of the disputed land only on the basis of the mere words of mouth from the Respondent and his witnesses that the Respondent

was given the disputed land by his father without producing any documentary evidence that is title deed, deed of gift, a will, letter of administration, a contract or an agreement whatsoever or any written document to prove the same while the Appellant herein produced documentary evidence that is purchasing contract dated 18/06/1998 exhibit D1 and other eight supportive documents exhibit D2, D3 and D4 collectively prove the lawful purchasing of the disputed land and ownership. He submitted that all these documents were to support the whole process on how the Appellant lawfully and innocently purchased the disputed land in 1998, plus witnesses testimony which altogether was ignored by the Tribunal, instead based on the mere words of mouth from the Respondent and her witnesses that the Respondent was given the disputed land by her late father in 1987. He cited section 112 of the Law of Evidence Act, Cap 6 R.E. 2022, for a proposition that who allege must prove. Also cited the case of **Hemed Said vs. Mohamed Mbilu** (1984) TLR 113, **Jeremiah Shemweta vs. Republic** (1985) TLR 228.

Ground number two, the learned Counsel submitted that the records in the trial proceedings page 42 second paragraph, shows that the Appellant purchased the disputed land almost more than eighteen years ago since 18/06/1998 from one Bi. Ana Hamis @ Mama Fatuma Mrisho. He submitted that the Appellant enjoyed the disputed land peaceful and made developments including planting

cassava, margosa tree on the border. He submitted that it is the settled principal of law that where a person occupies another land undisturbed for a long period of time, that person acquires that land by adverse possession. He cited the **Customary Land Law of Tanzania**, by W. James and G.M. Fimbo, page 533; **Nassoro Uhadi vs. Mussa Karunge**, HC Dar es Salaam, Civil Appeal No. 17/1977; item 22 of Part I of the Schedule of the Law of Limitation Act, Cap 89 R.E. 2019.

Ground number three, the learned Counsel submitted the matter was chaired and heard by four chairpersons namely Hon. Njiwa presided from 27/11/2020 Hon. Kanyerinyeri presided on 27/02/2020, Hon. Lungwecha presided from 03/08/2020 to 20/06/2022 and Hon. K.A. Sosthenes presided from 15/09/2020 up to the date of judgment 04/08/2023. He submitted that it's the mandatory requirement that one must assign reasons for taking over the matter from another chairperson, arguing only Hon. K.A. Sosthenes assigned reasons for taking over. He submitted that Hon. J. K. Kanyerinyeri and Hon. Lungwecha they never assigned reasons for change or reasons for failure to proceed with a trial. He submitted that the same effect the jurisdiction of the assessors, detriment of justice, dirtying witnesses testimonies and administration of justice.

Ground number four, the learned Counsel submitted that according to the records of the Tribunal dated 20/06/2022 one assessor namely Milinga passed away on preliminary stage of hearing and from this date the Tribunal proceeded with the trial with only one assessor namely Mzee Mwasonga, arguing no record suggest there was a replacement after the death of the late Milinga. He cited section 23(1) and (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019, **Amri Shabani Gunda vs. Salum Mohamed Mashauri**, Civil Appeal No. 84/2021 C.A.T; **The Ophilda Augustino vs. Edna Matumba**, Land Appeal No. 46/2018; **Ameir Mbarak vs. Edger Kahwill**, Civil Appeal No. 154/2015 CAT.

Ground number five, the learned Counsel submitted that the Respondent filed a suit claiming a suit land with a size of 1.25 (11/4) acres while the Appellant claimed to own 1.5 (11/2) acres by way of purchase in the year 1998. he submitted that when the Tribunal visited the *locus in quo* admitted that parties are disputing over one arear but they had got different boundaries or demarcations. He submitted that the Tribunal was wrong to announce the Respondent as winner of the disputed land while completely failed to make a proper identification and description of the suit land. He cited the case of **Melami Mesarieki Lemnjere (Administrator of the Estate of the Late Mesarieki Lenjere vs. Saigurani Lenjere Magie Sakaya Kivuyo**, Land Appeal No. 21/2022.

In reply, Mr. M. R. Kiondo learned Counsel for Respondent, submitted that the Tribunal decided the case in relation to the issue in dispute, facts of the case and based on the weight of evidence adduced by the Respondent which was corroborated by her witnesses. He submitted that the Respondent tendered various documents to substantiate her claims including, decision of Criminal Case No. 18/2001 exhibit P1, a letter dated 20/07/2017 exhibit P2, valuation report dated November, 2017 and a letter dated 13/11/2017 exhibit P3. He cited sections 110, 112, and 119 of Cap 6 (supra), **Hemed Said vs. Mohamed Mbilu** (1984) TLR 113.

He submitted that exhibit D1 purports to have been executed in 1998 but witnessed in 2003. He submitted that the purported vendor or her relative or legal representative had not been called to testify in favour of the Appellant. He cited a case of **Hemedi Said vs. Mohamed Mbilu** (1984) TLR 113. He submitted that the purported documentary evidence by the Appellant were so weak and could not support the Appellant's case. He submitted that exhibit D1 shows no boundaries, location and neighbours. He submitted that exhibit D1 purports to have been executed in 1988 but witnessed in 2003. He submitted that the purported vendor or her relative or legal representative had not been called to testify in favour of the Appellant. He cited a case of **Hemedi Said** (supra). He submitted that exhibit D1, D2, D3 and D4 do not prove that the

Appellant is the owner of the suit land. He cited the case of **Barella Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237/2017 CAT. He submitted that from the oral evidence on record and exhibit P1, P2 and P3 there is no doubt that the Respondent's evidence adduced at the trial was heavier than that of the Appellant showing or proving that the Respondent is the lawful owner of the disputed land.

Ground number two, the learned Counsel submitted that the allegation by the Appellant that he occupied the suit land for more than eighteen years is misconceived and not supported by evidence, arguing in no point in time he was in possession and occupation. He submitted that the Respondent has succeeded to prove that she was in occupation and possession over the suit land since 1987. He cited item 22 of Part I of the First (sic) Scheduled and section 4 Cap 89 (supra), for a proposition time limitation commences immediately from the date when the cause of action accrues.

Ground number three, the learned Counsel submitted that Hon. Njiwa was administratively suspended by the Minister for Lands Hon. Lukuvi, Hon. J.F. Kinyerinyeri did not hear the matter, Hon. Lung'wecha succeeded Hon. Njiwa, Hon. K.A. Sosthenes was re assigned for special session, who finally determined the matter. He distinguished **Hamis Miraji** (supra), arguing was in relation to

section 214(1) of the Criminal Procedure Act, Cap 20 R.E. 2002, while the matter at hand is governed by Cap 216 (supra) and G.N. No. 174/2003.

Ground number four, the learned Counsel submitted that hearing of the case commenced on 20/02/2019. On 20/06/2022 it was reported that one Milinga passed away, cited page 30 of the typed proceedings. He submitted that at the death of the late Milinga, the Respondent and her witnesses had already testified, arguing no way a new assessor could be appointed. He cited the case of **Amiri Shabani** (supra), page 6, section 23(3) of Cap 216 (supra). He submitted that Kalandamya never gave the opinion on the matter, arguing her name erroneously appear at page 86 of the proceedings, he opined it being a typing error curable under overriding objective. He submitted for her opinion to be expunged from the record. He cited the case of **Copper vs. Smith** (1884) 26 CLD 700 Page 710, **Nimrod Elirehema Mkono vs. State Travel Services Ltd & Another** (1992) TLR.

Ground number five, the learned Counsel submitted that the description/identification/demarcations of the suit land had been clearly stated and the parties are disputing over the same suit land. He submitted that the Tribunal visited the *locus in quo* to come up with a conclusion/finding that the dispute is over the same land. He submitted that the size and boundaries had been clearly in the oral and documentary evidence adduced by the Respondent

and her witnesses. He submitted that the suit land is unsurveyed land, arguing the difference of measurements does not in his view invalidate the evidence of ownership. He submitted that what is common is that the parties are referring to the same and one suit land. He cited the case of **Ally Abdallah Rajabu vs. Saada Abdallah Rajabu** (1994) TLR 132, on assessment of the credibility of a witness.

On my part, on ground number one, the trial Tribunal is faulted for nothing, the Respondent vindicated that she was given the suit land by her late father in 1987, in a form of gift, where the handing over were done in the presence of Swalehe Mohamed, Athuman Ally, Ahmed, Swalehe Ally, Mohamed Ally and her late mother. Swalehe Mohamed, Athuman Ally and Salehe appeared before the Tribunal and testified as PW2, PW3 and PW4 respectively. PW2 PW3 and PW4 consistently supported a case of the Respondent that she was given a suit land as a gift, by her father in 1987, where PW2 is a care taker from 1987 to date. Above all, the Respondent tendered a copy of a judgment Kerege Ward Tribunal, in Criminal Case No. 18/2001 where the Respondent was declared a lawful owner after the complainant therein one Mrisho Shaabani (not a party at the trial Tribunal) conceded a fact that the vendor one Mama Fatu Hamisi where (Mrisho Shaabani alleged to purchase) was not the legal owner. The alleged Mama Fatu Hamisi seemingly is also dubbed as Mama Fatuma Mrisho @ Bi Anna

Hamis (as per the testimony of DW2 Mustafa Shadu) who vended to the Appellant. However, the Appellant failed to defend his title over ownership. As alluded by the Counsel for Respondent, a sale agreement exhibit D1 shows no boundaries, location or neighbours. The Appellant alleged he purchased the suit land on 18/06/1998, but exhibit D1 was attested by the hamlet chairman on 17/05/2003. Indeed, the Appellant conceded that the alleged hamlet chairman was not there when sale transaction and exhibit D1 was executed by parties.

The Appellant conceded a fact that the vendor alleged she was allocated by the village council but did not exhibit any documentation for allocation. The Appellant stated that the vendor did not show or introduce him to any neighbour, the same facts was supported by DW2 who said during transaction of sale in exhibit D1, neighbours of Mama Fatu were not there. Ali Minge (DW3) who was a witness in exhibit D1, stated that he has no recollection if neighbours were involved in exhibit D1.

As such, the argument that the Appellant had tendered documents to support his case, is baseless, because the document tendered could not prove his title over ownership of the disputed land. A call by the learned Counsel for Appellant, that the Respondent did not tender a title deed, deed of gift, a will, letter of administration, a contract or agreement, is legally unfounded. As per the findings of the Tribunal, the father of the Respondent was owning that farm

under customary tenure, the gift was done at family level, orally. Indeed, a gift cannot be substantiated by a will, title deed, contract or letter of administration. In fact, nowhere the Respondent asserted to have acquired by inheritance.

Therefore ground number one is dismissed.

Ground number two, to my view a plea of adverse possession cannot be invoked along allegation or plea of acquiring the suit land by way of purchase. Nowhere in the written statement, the Appellant pleaded adverse possession. Above all a plea of adverse possession from 1998 as alleged by the Appellant cannot be said to have been successful grounded where the Respondent and PW2 also exhibit P1, indicate that someone trespassed the suit land in 2001. Again the Appellant and his witness Ali Minge (DW3) acceded a fact that there was a dispute at a Ward Tribunal, meaning that his adverse possession if any, was not smooth, rather constantly under interruption here and there.

Therefore ground number two is dismissed.

Ground number three, it is true that the first assignment on this matter at the Tribunal was done to Hon. Njiwa who presided from 22/01/2018 up to 20/02/2019. On 27/02/2020 the matter was adjourned before Hon. Kanyerinyeri, then from 03/08/2020 Hon. Lung'wecha presided over up to 06/09/2022 when the matter was re assigned to Hon. Sosthenes for special cleanup session. However, the Appellant did not explain as to how he was

specifically prejudiced in the take over from one learned Chairman to another. Above all our civil procedure is somehow relaxed on successive trials. In that there are no strict rules as to successive trials. Order XVIII rule 10(1) of the Civil Procedure Code, Cap 33 R.E. 2019, provide,

"Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it"

Unlike the procedure under the provision of Section 214(1) and (2) of the Criminal Procedure Act Cap 20 R.E. 2019 which provide categorically that if the successor magistrate form an opinion that the accused has been materially prejudiced, may order retrial. Therefore, the argument of the learned Counsel for Respondent that in **Hamis Miraji** (supra) it was in relation on to the successive trial under the domain of section 214(1) of Cap 20 (supra), is valid. Be as it may, the overriding argument is whether the party complaining was prejudiced, which in this case is none. Therefore ground number three is dismissed.

Ground number four. It is true that a trial had commenced with the aid of two wise assessors. However, on 20/06/2023 Milinga was reported dead. Nevertheless, at the time of the death of the late Milinga, the Respondent and her witness had already adduced evidence. Therefore, as alluded by the learned Counsel for Respondent, there was no room for substitution of another assessor. Therefore, it was correct for the Tribunal to proceed with the aid of a single assessor Mzee Mwasingo who opined in writing and appended his signature on 19/10/2022. I agree with the argument of the learned Counsel for Respondent that the name of Kalandanya was wrongly inserted in the coram of proceedings on 02/12/2022, because he neither participated in the trial nor furnished opinion. As such his name is discarded in the proceedings of the Tribunal.

Therefore ground number five is dismissed.

Ground number five. This ground is unmerited. In the application, the Respondent had described her suitland to be measuring approximately 1.25 acre, located at Amani, Kerege, Bagamoyo, Coast Region. In evidence, the Respondent stated that her area size is 1.25 acre. PW3 stated that the land trespassed by the Appellant is 1.25 acre. A mere fact, that the Appellant asserted to have purchased a land measuring 1.5 acres at the verge when he was asked by the learned Chairman, is immaterial. This is because in his

examination in chief he did not state a size of his land, likewise in his written statement of defence he was referring as a suit land, meaning he was referring to the same suit land location (description) and size pleaded by the Respondent. Above all, in the pleading, the Respondent stated it is approximately 1.25 acre, did not say it is exactly 1.25 acre.

More importantly, at the *locus in quo*, the Tribunal observed that parties are lingering over the same area, although with slightly discrepancy on boundary mark, but opined that the area is the same over which each party claim ownership. Therefore the argument that parties are claiming an area with different boundaries, was based on the entire misconception on the part of the learned Counsel for the Appellant, regard as to what the Tribunal said on its opinion. Nowhere the Tribunal said boundaries are different, only stated that mark of boundaries are slightly different from each other. Boundaries and mark of boundaries cannot have different meaning.

Ground number five is dismissed.

The appeal is dismissed with costs.



E. B. LUVANDA
JUDGE
12/12/2023

Judgment delivered in the presence of Mr. Stephen Mosha, Advocate holding
brief for Mr. Philemon Mganga learned Counsel for Appellant and Respondent.



E. B. LUVANDA
JUDGE
12/12/2023

A handwritten signature in black ink, appearing to be "E. B. Luvanda", written over the typed name and date.