IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPEAL NO. 16 OF 2022

(Arising from the decision of the District Land and Housing Tribunal for Rukwa at Sumbawanga in Land Appeal No. 45 of 2020 which originated from the decision of Pito Ward Tribunal in Land Case No. 21 of 2019)

CARISTO KALIPESA.....APPELLANT

VERSUS

EMELENSIANA KALYILA.....RESPONDENT

JUDGMENT

5th December, 2023 & 15th March, 2024

MRISHA, J.

As it appears above, the present appeal arises from the decision of the District Land and Housing Tribunal (the appellate tribunal) which originated from the decision of Pito Ward Tribunal (the trial tribunal). At the trial tribunal the appellant **Caristo Kalipesa** unsuccessfully sued the respondent **Emelensiana Kalyila** over a piece of land estimated to be twenty (20) acres.

He also loosed before the appellate tribunal and therefore, decided to come to his court in order to challenge the decisions of the two lower courts. His Memorandum of Appeal is predicated on the following grounds of appeal: -

1. That the (sic) leaned Chairperson of the District Land and Housing Tribunal erred in law and fact by not considering the issue of locus standi and power of attorney hence arrived at a wrong decision.
2. That the learned Chairperson of the Appellate Tribunal erred in law and fact by failing completely to evaluate the evidence of the appellant from the proceedings at Pito Ward Tribunal.
3. That the Chairperson of Sumbawanga District Land and Housing Tribunal did not observe that the ward Tribunal at Pito was not properly constituted during that time hence injustice decision.
4. That the Chairperson at Sumbawanga District Land and Housing Tribunal did not see that the members of Pito Ward Tribunal did not sign each day they attended the proceedings hence reached at a wrong decision.
5. That the Ward Tribunal erred in law and fact by not considering time of recovering of the land.

6. That the evidence of the respondent was weak compared to that of the appellant which was strong.
7. That the appellant was not fully treated as according to the principles of natural justice.

The appeal was heard by way of written submissions and both parties complied with the order of the court by filing their respective written submissions through their learned advocates. Hence, the present judgment.

Submitting in respect of the grounds of appeal, Mr. James Lubusi, learned advocate for the appellant argued that one Nicolaus Efrem Kalyila had no locus standi to prosecute the case against the appellant at the trial tribunal. He added that if the respondent was not capable of prosecuting her case, then she ought to grant Nicolaus Efrem Kalyila a Power of Attorney.

Stressing on that point, Mr. Lubusi challenged the appellate tribunal for trying to rectify the above irregularity by invoking the provisions of section 18 (2) of the Land Dispute Courts Act, Cap 216 R.E. 2019 (the LDCA). According to him, that section does not permit a relative to prosecute the case on behalf of a party in the land case before the ward tribunal.

Arguing about the second and sixth grounds of appeal, the appellant counsel submitted that one Mzee Logasio who is the appellant's father had been in occupation of the disputed land for a long time, as it is shown at page 5 of the trial tribunal typed proceedings, but the appellate tribunal failed to evaluate that evidence; hence, reached to a wrong decision.

The counsel added that even the gentlemen assessors who sat with the hon. Chairperson of the appellate tribunal had the opinions that the disputed land belongs of the appellant.

In regard to grounds number three and four of the appellant's Memorandum of Appeal, Mr. Lubusi submitted that the hearing of the land case before the trial tribunal commenced on 13.10.2019 and the judgment was delivered on 24.04.2020, but it is only one day that the members of the said tribunal appended their signatures on the proceedings of the trial tribunal.

The appellant counsel added that even the genders of the said trial tribunal members were not indicated in the said proceedings. He gave an example that the trial tribunal proceedings show that on 17.12.2021 the members of the said tribunal attended the proceedings, but they did

not sign the proceedings which is contrary to the law, as provided under section 11 of the LDCA.

To bolster his stance, Mr. Lubusi cited the cases of **Elias Horo vs Yohana Machawa**, Misc. Land Appeal No. 171 of 2016 and **Akleus Masanja and Akleo Ntandu vs Sabas Lupia**, Land Case No. 08 of 2006 (all unreported) in which the court quashed the whole proceedings and judgment of the Ward Tribunal for being fatally irregular.

Turning to the fifth ground of appeal, Mr. Lubusi began by referring the court to the cases of **Nassoro vs Rajabu Simba** (1967) HCD No. 233 and **Augusta Mpolo vs Ramadhani Shabani Msuya**, Misc. Land Appeal No. 98 of 2017 (unreported) in which the principles of adverse possession were discussed.

Having cited the above cases, the appellant counsel submitted that the appellant has been in occupation of the disputed land for a long period of time, therefore, it will be against the public policy to disturb the appellant who has been in occupation of the disputed land for more than fifteen years.

He added that the principle of law stated in the case of **Ramadhan Makwega vs Theresian M. Mshuza**, Misc. Land Case No. 3 of 2918 (unreported) to the effect that an invitee cannot have right over the

ownership of land, cannot apply to the case at hand because the appellant had been in occupation of the disputed land for a long period of time.

In winding up, Mr. Lubusi urged the court to find that the trial tribunal was not properly constituted as it failed to list the names and gender of the said tribunal and to show their signatures. He further argued that there was enough evidence to show that the appellant had been in occupation of the disputed land for a long time and that the respondent had no locus stand to prosecute the case.

He therefore, requested the court to quash and nullify the decisions of both the trial tribunal and appellate tribunal and declare the appellant as the lawful owner of the disputed land. He also urged the court to order for vacant possession and costs immediately after allowing the instant appeal.

In reply, Mr. Mathias Budodi, also learned advocate who represented the respondent, submitted in respect of the first ground of appeal that since it is not in dispute that Nicolaus Efrem Kalyila and the respondent are blood relatives, then prosecuting the matter on behalf of the relative as it happened in the case before the trial tribunal, is allowed under section 18 (2) of the LDCA.

He added that what is purported by the appellant to be irregularity, is a total misconception and or ignorance of the law. He thus, invited the court to find ground number one to be misconceived hence devoid of merit and proceed to reject it.

In respect of the third and fourth grounds of appeal, Mr. Budodi submitted that the appellant has admitted that at the commencement of the trial, all members dully listed their names and signed the proceedings and on 07.01.2020 as well as on 21.04.2020; the records reveal that trial tribunal was properly constituted and the genders of its members were indicated which all means that they complied with the provisions of section 11 of the LDCA.

The respondent counsel also contended that it is not true that the hearing of the land case before the trial tribunal commenced on 17.12.2021 as claimed by his learned friend because the judgment of the said tribunal was delivered on 21.04.2020.

He added that it is now a settled principle that the omission to put names and signatures of tribunal members is not fatal when it comes to substantive justice; hence curable under the oxygen principle as it was held in the case of **Yakobo Gichere vs Penina Yusuph**, Civil Appeal No. 55 of 2017 (CAT at Mwanza, unreported). Finally, the respondent

counsel invited the court to reject grounds number three and four of appeal for being devoid of merits.

As for the fifth ground of appeal, the learned counsel for the respondent submitted that mere long occupation and use of land does not per se constitute adverse possession; long time must be of more than twelve years, but the appellant neither justified and substantiated when he possessed the disputed land, nor did he specify the year he began to occupy the same.

That the appellant failed even to show the boundaries of the disputed land which he alleges to have been in occupation for more than fifteen years. In addition to that, Mr. Budodi submitted that there can never be adverse possession where there is proof of being a licencee or invitation to the land, as per the case of **Ramadhan Makwega vs Theresia Mshuza** (supra).

However, the respondent counsel submitted that there is enough evidence on record to show that the appellant was an invitee to the disputed land. That fact is supported by the conduct of the appellant's family to handle over the disputed land according to the meeting held on 08.06.2013.

He added that the said handling over meeting implied, by all necessary implications, that the whole family knew that their deceased father was merely an invitee that is why there was no any resistance from the family to return back the disputed land to the respondent's family. He therefore, prayed to the court to reject the fifth ground of appeal for being devoid of merit.

In regard to the second and sixth grounds of appeal, Mr. Budodi had two points to make; first he submitted that the records of the trial tribunal show that the appellant failed to prove his case before the said tribunal due to his failure to show the boundaries of the disputed land he claims to have been in occupation for more than fifteen (15) years.

He also submitted that the impugned judgment of the trial tribunal was grounded on the evidence properly adduced during trial and that failure of the appellant to show the boundaries of the disputed land signifies that he was not familiar with the said land.

Secondly, the respondent counsel submitted that the allegations that the members of the trial tribunal were not changed as the High Court directed through its previous judgment and that some of those members are relatives of the respondent, are baseless because the records of the

trial tribunal are certain on the names, gender and signatures of the said members.

From the above submissions, Mr. Budodi prayed that all the grounds of appeal raised by the appellant be dismissed with costs for lack of merits.

Having read the above rival submissions and the cited authorities, my task now is to determine whether the present appeal is meritorious. As it appears from the appellant's memorandum of appeal, there are seven grounds of grievance which have to be considered and addressed by the court.

However, in my view, this appeal can be disposed of by the first, second, fifth and sixth grounds of appeal. I say so because after going through the proceedings of the trial tribunal, I have observed that the complaints contained in the rest grounds of appeal have no legs to stand.

The said records clearly reveal that the trial tribunal properly evaluated the evidence of both parties before deciding in favour of the respondent. Also, the said records reveal that the trial tribunal was properly constituted and its members appended their signatures on the proceedings.

Not only that, but also, it is apparent on record that both parties were afforded an opportunity to adduce their evidence, asking questions and calling their witnesses. Hence, it is not true that the principles of natural justice were not complied with by the trial tribunal.

Starting with the first ground of appeal, it is the submission of the counsel for the appellant that the person called Nicolaus Efrem Kalyila had no locus standi to prosecute the case against the appellant at the trial tribunal.

He added that if the respondent was not capable of prosecuting her case, then she ought to grant Nicolaus Efrem Kalyila a Power of Attorney. He has also submitted that the provisions of section 18 (2) of the LDCA invoked by the hon. Chairperson of the appellate tribunal were misconceived.

On the adversary side, the respondent's counsel has submitted that there is no merit on that complaint because the law applied by the hon. Chairperson of the appellate tribunal allows a relative to stand on behalf of a party before the trial tribunal.

Section 18 (2) of the LDCA provides that:

"18. Appearance by advocate prohibited

(1) ,,, N/A.

(2) Subject to the provisions of subsections (1) and (3) of this section, a Ward Tribunal may permit any relative or any member of the household of any part to any proceeding, upon request of such party to appear and act for such party.

(3) ,,, N/A."

The above provision is clear that the ward tribunal may permit any relative or any member of the household of any party to any proceedings to appear and act for such party upon request of such party. There is nowhere in that provision it is stated that a party to the case before a ward tribunal must grant a power of attorney to his relative or any member of his/her household. What is required of him/her is to make a request before a ward tribunal for his relative to appear and act on his/her behalf.

Reverting back to the present appeal, it is not in dispute that the records of the trial tribunal are silent as to whether the respondent made a request to the trial tribunal that her relative who is Nicolaus Efrem Kalyila, be allowed to appear before that tribunal and act on her behalf.

However, since that person who is a relative of the respondent, appeared and acted on behalf of the respondent from the beginning to the end of the trial before the trial tribunal without any objection from the appellant, I am of the settled view that by necessary implication, he was allowed by the said tribunal to appear and act on behalf of the respondent.

Hence, I agree with the counsel for the respondent and the hon. Chairperson of the appellate tribunal who invoked the provisions of section 18 (2) of the LDCA to resolve the appellant's complaint about the issue of locus standi in favour of the respondent. The first ground of appeal is therefore found to be devoid of merit and dismissed.

Having determined the first ground above, I will now deal with the second and six grounds of appeal altogether because they all revolve around the issue of evidence and standard of proof in civil cases. It is a trite law that the burden of proof in civil cases lies on that person who wishes the court to believe in its existence and give judgment in his/her favour; the basis of the above court's position is derived from the provisions of section 110 (1) and 112 of the TEA.

The appellant has complained that the appellate tribunal failed completely to evaluate his evidence which according to him, was strong

compared to that of the respondent. His advocate has supported that proposition his submission in chief.

However, the counsel for the respondent has backed the Hon. Chairperson of the appellate tribunal for properly reevaluating the evidence of both parties adduced before the trial tribunal and found that the appellant failed to prove his case against the respondent.

On my part, I had taken pain to go through the typed judgment of the appellate tribunal as well as the typed records of the trial tribunal in order to find out whether the complaints of the appellant which are contained in grounds number two and six, have merits.

My careful perusal of the same reveals that despite claiming to have been in occupation of the disputed land for more than fifteen years, the appellant failed to prove his case before the trial tribunal compared to the respondent whose evidence was strong and proved her ownership of the disputed land.

It is also on record that the appellant failed to show the boundaries of the disputed land. Also, I have observed as rightly submitted by the counsel for the respondent that, even the evidence of the appellant before the trial tribunal indicates that the disputed land does not belong to him, but to the respondent.

Therefore, owing to the above reasons, I am in line with the submission of the counsel for the respondent that the second and six grounds of appeal raised by the appellant have no merits and they stand to be dismissed, as I hereby do.

The last for my determination, is the fifth ground of appeal in which the appellant has faulted the appellate tribunal for its failure to consider the time of recovery of the land. It is the submission of the appellant's counsel that the appellant has been in occupation of the disputed land for more than fifteen years undisturbed, hence entitled to be declared the lawful owner of the same through adverse possession.

He has also submitted that even if the adverse party will argue that an invitee cannot have a right over the ownership of land as stated in the cases of **Ramadhan Makwega vs Theresia M. Mshuza** (supra) and **Angelo G. Kapufi vs Edward Matondwa** (supra), still that principle cannot apply in the present case.

To the respondent's counsel, that argument by the appellant's counsel is unmerited because it is on record that despite claiming to have been in occupation of the disputed land for a long time, the appellant was an invitee as his grand father was borrowed the disputed land by the

respondent's family; hence, the principle stated in the above cases applies to the circumstances of the case at hand.

The counsel for the respondent has gone far by submitting that the handling over meeting of the disputed land which was convened on 08.06.2013, is another justification that the disputed land does not belong to the appellant, but to the respondent. I entirely agree with that proposition because it is on record that even the appellant told the trial tribunal that there was such meeting and the disputed land was given to the family of the respondent.

Therefore, since the appellant was an invitee on the disputed land, the principle of law that an invitee cannot have a right over the ownership of land through adverse possession, applies mutatis mutandis against him. Afterall, in his testimony, the appellant failed to prove to the trial tribunal how he came into possession of the disputed land.

I may also add that his complaint before the trial tribunal that he was given the disputed land by the DLHT, was not supported by any documentary proof and if that was true, the appellate tribunal could not decide the land dispute in favour of the respondent, as it did.

It is due to the above reasons that I find the present appeal to be without merits. Consequently, I upheld the decisions of the two lower courts and dismiss the appellant's appeal with costs.

Ordered accordingly.

A.A. MRISHA
JUDGE
15.03.2024

DATED at **SUMBAWANGA** this day of 15th March, 2024.

THE HIGH COURT OF TANZANIA

A.A. MRISHA
JUDGE
15.03.2024